No.

IN THE

Supreme Court of the United States

FLYING J INC., TCH LLC, CFJ PROPERTIES, TON SERVICES, INC., AND TFJ,

Petitioners,

v.

COMDATA NETWORK, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In conflict with the decisions of this Court and several courts of appeals, did the Tenth Circuit err in reversing the district court's order enforcing a complex antitrust settlement in part because the district court considered the goal of the federal antitrust laws when interpreting the settlement agreement?

2. This Court held in *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985), that when there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous, and a trial judge's decision to credit the testimony of one witness cannot be clear error. Did the court of appeals misapply *Anderson v. City of Bessemer City*, when it held (with one judge dissenting) that the trial court's decision to credit the testimony of one witness on the meaning and intent of a contract was clearly erroneous as a matter of law because: a) the "[trial] court should have considered [the other party's] proffered evidence"; and b) the trial court adopted "almost verbatim" one party's proposed findings of fact and conclusions of law?

3. When, as part of managing its docket efficiently, a trial court requests proposed findings of fact and conclusions of law from both parties after an evidentiary hearing in a complex, technical case and then relies on one party's proposed findings in the court's final ruling following a bench trial, should that procedure make any difference to the court of appeals when reviewing fact findings under the "clearly erroneous" standard?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Under Rule 29.6 of the Rules of this Court, petitioners state as follows:

The Plaintiffs in the underlying case were:

- FLYING J INC., a Utah corporation,
- TCH, LLC, a Utah limited liability company,
- CFJ PROPERTIES, a Utah partnership,
- TON SERVICES, INC., a Utah corporation,
- TFJ, a Utah partnership, and
- NCR CORPORATION, a Maryland corporation.

ConocoPhillips Co., a public company, is a part-owner of TCH, LLC and CFJ Properties. Apart from that, no public company owns shares or an interest in the Petitioners.

Ownership of TCH, LLC: Flying J Inc., a privately held corporation, through a wholly owned subsidiary, is the beneficial owner of 75% of TCH, LLC, a limited liability company that offers the TCH trucker fuel cards and related services to trucking companies and truck drivers. The other 25% of TCH, LLC currently is owned by a subsidiary of ConocoPhillips Co., a publicly held corporation.

Ownership of CFJ Properties: Flying J Inc., through a wholly owned subsidiary, is the beneficial owner of 50% of CFJ Properties, a partnership that owns and operates some of the Flying J travel plazas in the United States. The other 50% of CFJ Properties currently is owned by a subsidiary of ConocoPhillips Co., a publicly held corporation.

NCR Corporation was not involved in the post-settlement proceedings at issue in this appeal and is not a party to this appeal.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Flying J Inc., TCH LLC, CFJ Properties, TON Services, Inc. and TFJ (collectively, "Flying J") respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a-29a), is reported at 405 F.3d 821 (10th Cir. 2005). The district court's order granting Plaintiffs' motion to enforce the settlement agreement (App., *infra*, 30a-59a) is not reported but is available at 2003 U.S. Dist LEXIS 25684 (D. Utah Sept. 25, 2003).

JURISDICTION

The district court had federal question and diversity jurisdiction over the underlying antitrust and tort claims under 28 U.S.C. §§ 1331, 1332, and 1337. It had jurisdiction to enforce the parties' antitrust settlement agreement under *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994). The court of appeals had jurisdiction to review the district court's order under 28 U.S.C. § 1292(a). The court of appeals originally entered judgment on April 13, 2005, and Petitioners filed a timely petition for rehearing. On August 3, 2005, the court of appeals entered its order denying rehearing and rehearing *en banc*. App., *infra*, 62a-63a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Under this Court's Rule 14.1(f), Fed. R. Civ. P. 52 is set forth in the Appendix, *infra*, 64a-65a.

STATEMENT OF THE CASE

1. After nearly five years of discovery and pretrial preparation in the underlying antitrust case, and on the eve of trial, Respondent Comdata agreed to a comprehensive settlement. As part of that 2001 settlement, Comdata agreed to enter into two license agreements that were crafted to open up the two markets that Flying J contended Comdata had monopolized, and to pay $49 million in damages to settle Flying J's antitrust and tort claims. The parties' settlement agreement and the order dismissing the suit vested the district court with continuing jurisdiction to enforce the parties' settlement agreement. App., *infra*, 47a-48a, 80a-81a.

Indicating the procompetitive intent of the parties' settlement agreement, that agreement specifically afforded the same relief to Flying J that the public had received as the result of a Federal Trade Commission antitrust enforcement action against Comdata and an ensuing consent order between Comdata and the FTC:

> COMDATA, ARBITRON, and CERIDIAN agree that as of the Effective Date of this Settlement Agreement, FLYING J and TCH shall be deemed entitled to receive all the rights, privileges, and benefits afforded by the Federal Trade Commissions Decision and Order dated April 5, 2000 in *In re the matter of Ceridian Corporation*, Docket No. C-3933 ("FTC April 5, 2000 Order").

App., *infra*, 84a (Settlement Agreement § 18). In addition, the Trendar License, whose provisions the Tenth Circuit purported to interpret, specifically incorporated by reference the terms and conditions of the FTC April 5, 2000 Order and attached a copy of it as Exhibit 1 to the License. App., *infra*, 88a (Trendar License, Art. 1).

2. After Plaintiffs filed a motion to enforce the settlement agreement, the district court held a bench trial in 2003

to decide factual issues raised by that motion. Seven witnesses testified at that trial. Based on the evidence, the district court found that Comdata had breached the settlement agreement by failing to implement the Trendar License, and directed Comdata to take steps to comply with its agreement. 2003 U.S. Dist. LEXIS 25684 at *43 (D. Utah Sept. 25, 2003), App., *infra*, 55a.

The Tenth Circuit reversed that order enforcing the settlement agreement, holding that the district court's findings were clearly erroneous as a matter of law because of the court's alleged failure to consider the testimony of one Comdata employee who testified. 405 F.3d at 829, 835, App., *infra*, 10a, 21a ("We review the district court's findings of fact for clear error. . . . In our review of the record, Comdata produced substantial evidence indicating that it did not contemplate or intend that the Trendar License would lead to proprietary processing of TCH MasterCards at unaffiliated merchants, much less that this would be accomplished through a dual-processing model. . . . The district court's failure to consider Comdata's evidence was a legal error."). The court of appeals also criticized the district court for "adopt[ing] Flying J's proposed findings of fact and conclusions of law almost verbatim" saying: "Regrettably this appears to be the case." 405 F.3d at 829, App., *infra*, 11a.

3. The court of appeals took note of the strong evidence indicating that Comdata had substantial market power in two concentrated nationwide markets. In the underlying antitrust case filed in 1996, Flying J and its affiliated companies, including TCH, charged Comdata with monopolizing and attempting to monopolize two product markets that affect nearly all U.S. long-haul truck drivers and the truck stops where they purchase diesel fuel. As the court of appeals explained: "Flying J presented evidence in the underlying litigation that Comdata had secured approximately 90% of the

point-of-sale systems market by 2001. Virtually every major U.S. truck stop other than Flying J used the Trendar System." 405 F.3d at 825, App., *infra*, 3a. The court of appeals also explained: "According to Flying J, Comdata cards have dominated the trucker fuel card market for many years, securing a 70% share by 2001." *Id.* Comdata used a campaign of threats to maintain its market power: "Prior to the 2001 settlement, Comdata placed over four hundred telephone calls to truck stops and threatened to raise transaction fees on Comdata cards if they agreed to accept the TCH Fuel Card." 405 F.3d at 827, App., *infra*, at 6a.

4. Nevertheless, the court of appeals held that it was improper for the district court to have considered the purpose of the antitrust laws in enforcing the antitrust settlement agreement.

In construing the disputed license, the district court sought to interpret the agreement in a manner that would promote competition and consumer welfare:

> [S]uch an interpretation of the Trendar License will promote competition, which is consistent with the procompetitive goals of the Sherman Act. Allowing the TCH MasterCard Fleet Card to be processed in this fashion will expand the number of truck stops where TCH trucker fuel cards can be used by truck drivers with data capture and purchase control functionality and create a network of card acceptance that encompasses all truck stops that use the Trendar POS device, along with other truck stops such as Flying J stops, which already accept TCH cards. That will remove one of the barriers to TCH's ability to compete on a level playing field with the Comdata trucker fuel cards in transactions offering purchase controls and data capture - the current lack of widespread acceptance at U.S. truck stops that use the Trendar POS device.

2003 U.S. Dist. LEXIS 25684 at *12, App., *infra*, 36a.

In its reinterpretation of the settlement agreement, the court of appeals refused to consider the purpose of the antitrust laws of promoting competition and consumer welfare, even though the context of an antitrust settlement agreement necessarily is one of the most important objective indicators of the parties' intent, and even though the court of appeals concluded that the license was otherwise ambiguous. As the court of appeals reasoned: "We h ve no occasion to question the district court's conclusion that Flying J's interpretation of Article 4.2 would better promote the competitive objectives of the antitrust laws. But the issue at this stage is not what would be the most effectual remedy for a proven antitrust violation; the issue is what the parties agreed to in settling the litigation. The parties did not frame their settlement in terms of maximizing competition, but in terms of a specific procedure for processing credit card transactions." 405 F.3d at 835-36, App., *infra*, 22a.

The court of appeals left no doubt that it considered the antitrust context of the settlement irrelevant to the task of construing the disputed license: "In so doing, we emphasize that it is not our task to determine what would best remedy the underlying antitrust violation, but solely to interpret the agreement reached between the parties, in light of its plain language and the intent of the parties." 405 F.3d at 825, App., *infra*, 3a.

5. Judge McKay recognized in his dissent that the fact that the agreement resolved an antitrust dispute was the most important indicator of how the agreement should be construed:

> I have a much simpler view of this case than the majority. This case is a dispute over a claim that Comdata violated antitrust laws by restricting Flying J's access to the market. On the eve of trial, because Comdata real-

ized it was in jeopardy of an adverse judgment, it agreed to pay forty-nine million dollars to Flying J to compensate for past violations. In addition, to rectify future restrictions on market entry, it entered into the license that is the subject of dispute on appeal. As the majority points out, certain sections of the settlement agreement are ambiguous. Whatever their private post-hoc perception of the license, the language the parties chose does not itself tell the court which perceptions they intended.

What we do know is that the overall purpose of the license was to open access to the market. After hearing extensive evidence about the undisclosed understanding of each of the parties, the district court opted to find Flying J's understanding to be the more reasonable one. It then ordered a remedy that most effectively implemented that perception. Our job on appeal is to determine whether that finding is clearly erroneous. In my view, the parties' evidence lends itself to either party's interpretation. *The district court's selection of the interpretation that favors optimal opening of the competitive market seems to me to be eminently reasonable and supported by the record. Resolving any doubt in favor of the purpose of the antitrust statutes strengthens this conclusion.*

405 F.3d at 839, App., *infra*, 28a-29a (emphasis added).

REASONS FOR GRANTING THE WRIT

Granting certiorari to review the decision below is important to clarify the law for the lower federal courts regarding the relevance of the procompetitive goals of the antitrust laws to a court's interpretation of an antitrust settlement. The decision below conflicts with this Court's rulings and creates a conflict with other circuits by holding that the district court erred in considering the procompetitive goals of federal anti-

trust law as part of the task of construing the parties' antitrust settlement agreement. The decision below thus creates an impediment to effective federal court enforcement of the antitrust laws. Federal courts should be empowered to enforce antitrust settlement agreements and consent decrees taking into account the antitrust laws' core goal of promoting competition and consumer welfare.

This case presents an important opportunity for this Court to provide additional guidance about how lower courts should apply the four-corners rule of *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975), and *United States v. Armour & Co.*, 402 U.S. 673 (1971). Under those cases, federal courts are permitted to consider the circumstances surrounding formation of a consent decree. For an antitrust settlement, that includes information such as the procompetitive goals of the antitrust laws. The decision below cannot be reconciled with those principles.

The decision below also conflicts squarely with several decisions from other courts of appeals. The D.C. Circuit has held that it is proper to consider the procompetitive goals of the antitrust laws when enforcing a consent decree. The First, Third, Sixth, and Eleventh Circuits, in reliance on *ITT* and *Armour*, have concluded that it is appropriate to consider the circumstances concerning formation of a consent decree. The Second and Seventh Circuits are internally inconsistent, having applied *ITT* and *Armour* differently in different cases. Plenary review is warranted to restore clarity to this important area.

Granting certiorari also is important to clarify the law regarding whether a trial court's finding of fact crediting certain testimony over other testimony can be reversed as "legal error" notwithstanding the "clearly erroneous" standard for reviewing fact findings and whether trial judges properly

may base their written decision following a bench trial on proposed findings submitted by each party.

I. This Court's Cases Make Clear That Federal Courts Can And Should Consider The Procompetitive Goals Of The Antitrust Laws When Enforcing Antitrust Settlement Agreements.

A. This Court's "Four Corners" Approach For Construing Consent Decrees Permits A Court To Consider The Circumstances Surrounding Formation Of The Order, Including The Procompetitive Goals Of The Antitrust Laws.

This Court announced a "four corners" approach to construing consent decrees in *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971). In *Armour*, this Court explained that because a consent decree is entered into by parties after careful negotiation and agreement on their precise terms, "the scope of a consent decree must be discerned within its four corners." *Id.* at 681-82.[1] In *United States v. ITT Continental*

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[1] In *Armour*, the Court described that four corners approach:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the

Baking Co., 420 U.S. 223, 238 & n. 11 (1975), this Court clarified the "four corners" approach for construing consent decrees to confirm that it is proper for the construing court to look at the circumstances surrounding formation of the consent order.

In *ITT*, this Court interpreted a consent order entered into by the Federal Trade Commission and the Continental Baking Company by looking to the background leading to the order and by considering its antitrust context. 420 U.S. at 238-39. Explaining why this was appropriate, this Court stated:

> Since a consent decree or order is to be construed for enforcement purposes basically as a contract, reliance upon certain aids to construction is proper, as with any other contract. Such aids include the circumstances surrounding the formation of the consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated in the decree. [FN11] Such reliance does not in any way depart from the "four corners" rule of Armour.
>
> FN11. "Assuming that a consent decree is to be interpreted as a contract, it would seem to follow that evidence of events surrounding its negotiation and tending to explain ambiguous terms would be admissible in evidence." Handler, supra, n. 10, at 23 n. 148.

Id. at 238.

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conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.

402 U.S. at 681-82 (footnote omitted).

In applying this Court's holding in *ITT Continental Baking Co.*, most circuits have held that, although a consent order or settlement is not automatically deemed to encompass federal legislation on which the underlying claims were founded, a court construing such a consent order or settlement should consider the purposes the order was designed to serve and the circumstances concerning the formation of the decree.

For example, in *McDowell v. Philadelphia Hous. Auth.*, 423 F.3d 233 (3d Cir. 2005), the Third Circuit construed a consent decree between public housing tenants and the Philadelphia Housing Authority ("PHA"). The court recognized that although it should interpret the parties' agreement based on the four corners of the decree, based on this Court's precedent, it nevertheless could look to the regulations governing proper charges to tenants by the PHA. *Id.* at 239 (noting that "the Supreme Court has indicated that relevant statutes and regulations may sometimes be used to shed light on the terms of a consent decree" and observing that in *ITT* this Court looked to Section 7 of the Clayton Act for guidance on the meaning of words in an antitrust consent decree).

The First Circuit likewise interpreted an injunction arising from a consent decree between an inmate and the Massachusetts Department of Corrections ("DOC") in light of the litigation context. *Gilday v. Dubois*, 124 F.3d 277, 285 (1st Cir. 1997), *cert. denied*, 524 U.S. 918 (1998). The inmate challenged the DOC's actions as violative of the injunction. Analyzing the inmate's challenge, the court, relying on *ITT*, recognized that it had to evaluate the "contention against the language employed in the injunction, viewed in its unique litigation context, including the particular circumstances surrounding its formation and the basic purposes it was designed to serve." *Id.*

The Eleventh Circuit also has considered evidence of events surrounding a consent judgment's negotiation and evidence tending to explain ambiguous terms. *Turner v. Orr*, 785 F.2d 1498, 1502 (11th Cir. 1986). In *Orr*, the court was interpreting a consent decree to determine whether an award of attorneys' fees was required. *Id.* Following *ITT*, the court looked to the evidence regarding the negotiation of the agreement and documents expressly incorporated in the agreement to find that the award of attorneys' fees was proper in the context of the consent decree. *Id.*

In *United States v. Reader's Digest Ass'n, Inc.*, 662 F.2d 955, 961 (3d Cir. 1981), *cert. denied*, 455 U.S. 908 (1982), the Third Circuit reviewed the district court's interpretation of a consent order entered into by the Federal Trade Commission and Reader's Digest Association to resolve a deceptive advertising claim. The court recognized that although a consent order ordinarily is interpreted by examination of the four corners of the document, the district court properly considered promotional materials attached to the underlying complaint to understand the context of the order. *Id.*

Similarly, the Sixth Circuit has recognized the importance of construing a consent decree in a manner consistent with its purpose. *Brown v. Neeb*, 644 F.2d 551, 558 (6th Cir. 1981). In *Neeb*, the court interpreted a consent decree entered into by black and Hispanic firefighter applicants and the city of Toledo, Ohio. *Id.* at 553. The court, relying on *ITT*, recognized that it should consider all relevant aids to contract interpretation, which included an understanding of the objective of the consent decree. *Id.* at 558. The court construed the consent decree in a manner consistent with the objective of desegregating the fire division because it concluded that "the entire thrust of the decree is toward affirmative action to achieve a well-integrated department." *Id.*

In dealing specifically with antitrust settlements, the lower courts have recognized that it is proper for a court construing that settlement to take account of the procompetitive goals of the antitrust laws. For example, in *United States v. Microsoft Corp.*, 147 F.3d 935 (D.C. Cir. 1998), the D.C. Circuit reviewed the district court's entry of a preliminary injunction against Microsoft Corporation for allegedly violating an antitrust consent decree. The court noted that, "As *Armour* makes clear, . . . an antitrust consent decree cannot be read as though its animating spirit were solely the antitrust laws." *Id.* at 946. The court also explained that because the consent decree emerged from antitrust claims, "*we must keep procompetitive goals in mind in the interpretive task.*" *Id.* (emphasis added). Thus, the D.C. Circuit viewed the procompetitive goals of the antitrust laws as one aspect of the intent of the parties under their contract. *See id.*

The D.C. Circuit also found it proper to consider the procompetitive goals of the antitrust laws in analyzing a consent decree in *United States v. Western Electric Co.*, 894 F.2d 1387 (D.C. Cir. 1990). In *Western Electric*, the court explained that the consent decree was designed to deprive the Bell Operating Companies of the ability and incentive to engage in anticompetitive practices, to stymie efforts to thwart effective competition, and to eliminate the potential for monopoly abuse in the future. *Id.* at 1392. Accordingly, the court held that the district court in construing the consent decree properly considered evidence that the parties intended for the decree to eliminate "the *potential* for monopoly abuse in the future by remov[ing], clearly and efficiently, the *structural problems* that have given rise to the controversies between the United States and AT&T over the last three decades." *Id.* (internal quotations omitted) (emphasis in original).

Commentators have noted the trend since *ITT* to allow courts to consider information about the context of a consent

order or settlement. For example, in I ABA Section of Antitrust Law, *Antitrust Law Developments (Fifth)* (2002) § VIII.D.1.B.(4) at 762, the authors state: "Since *ITT*, courts have been more willing to consider extrinsic evidence on issues of interpretation."

Two circuits--the Second and Seventh—appear internally inconsistent in how they have responded to this Court's guidance in *ITT* that when applying *Armour's* four-corners rule, the court may consider basic evidence about the purpose of the parties' agreement.

In a 2001 case, the Second Circuit indicated that a consent order should be interpreted based on "the overall context of the judgment at the time the judgment was entered." *United States v. Muzak LLC*, 275 F.3d 168, 176 (2d Cir. 2001) (quotations omitted). In *Muzak*, the court was construing a consent order in an antitrust action that required Broadcast Music, Inc. to offer certain licenses. When the parties disputed the rate-setting mechanism for a certain license, the court interpreted the consent decree in the context of the parties' agreement and what the parties contemplated. *Id.*

Yet, two years earlier, in 1999, the Second Circuit was construing a consent judgment with the EEOC that was intended to promote a diverse work force. The court of appeals cited *Armour* and stated, "We note that the Supreme Court has cautioned against non-text based interpretations of consent decrees derived from amorphous purposes thought to underlie a decree." *EEOC v. New York Times Co.*, 196 F.3d 72, 78 (2d Cir. 1999). The court explained the obligations within the four corners of the agreement, and noted, "We are loathe to say that a generalized good-faith-performance obligation in a consent decree overrides specific pre-existing contractual provisions known to the parties." *Id.* at 79.

Similarly, in 1995 the Seventh Circuit, citing *ITT*, disapproved of the district court's approach that "goes behind the

language of the judgment" for a consent decree that resolved private claims for CERCLA cleanup costs. *See Citizens Elec. Corp. v. Bituminous Fire & Marine Ins. Co.*, 68 F.3d 1016, 1021 (7th Cir. 1995). The court explained that, "Lest there be any doubt, the Supreme Court adopted a four-corners rule for consent judgments. [citing *ITT Continental Baking*]. Like contracts with strong integration clauses, consent judgments satisfy the principle that what you see is what you get." *Id.*

Yet in 1979, the Seventh Circuit followed this Court's decision in *ITT* and construed a consent decree in a manner consistent with the circumstances indicating the parties' intent. *See Sportmart, Inc. v. Wolverine World Wide, Inc.*, 601 F.2d 313, 317 (7th Cir. 1979). The *Sportmart* court interpreted a consent decree between private litigants and decided that it was proper to "resort to the circumstances surrounding the formation of the consent decree in order to construe its terms." *Id.*

These different approaches within the Second and Seventh Circuits also illustrate the need for this Court to provide further guidance to the lower federal courts by granting certiorari here.

In the case below, the most important extrinsic evidence before the Court was the information on the antitrust context in which the parties agreed to their settlement and License Agreement and the procompetitive purpose of the License. The Tenth Circuit specifically noted the evidence of the highly concentrated market in which the Trendar License was intended to foster competition, yet it refused to consider that information when construing the parties' settlement agreement and license.

The Tenth Circuit decision below reflects an extreme approach to construing an antitrust settlement. Although the court recognized the strong evidence of concentrated mar-

kets, it faulted the trial judge for considering that antitrust context in his ruling enforcing the underlying license agreement in a manner that would actually help restore competition. The decision below rejected the trial court's common sense interpretation of Comdata's obligations under the settlement agreement because the disputed License did not spell out the specific TCH card processing method that has proved necessary for TCH effectively to compete in the market Comdata has monopolized. As Judge McKay explained in his dissent: "What we do know is that the overall purpose of the license was to open access to the market" and the district court selected an interpretation "that favors optimal opening of the competitive market . . . ." 405 F.3d at 839, App., *infra*, 29a.

Thus, contrary to this Court's ruling in *ITT*, the Tenth Circuit's decision below misses the forest for the trees by rejecting the reasonable interpretation of the parties' settlement that would foster rather than stifle competition.

B. Private Settlements And Consent Decrees Comprise A Commonly Used And Essential Element Of Effective Antitrust Enforcement.

Our free market economy depends on effective competition. The federal antitrust laws provide the bedrock support for such competition. This Court has held that the antitrust laws represent a "fundamental national economic policy." *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 218 (1966). Private antitrust enforcement provides an essential adjunct to scarce government enforcement efforts. *See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969) (private enforcement serves the "high purpose of enforcing the antitrust laws").

Relatively few private antitrust cases are litigated to a verdict. Most—like this one—settle before trial. Few plaintiffs can afford the investment required to litigate complex

antitrust claims. As a result, parties frequently use settlement agreements or consent decrees to try to restore competition to concentrated markets. Thus, antitrust consent decrees and settlement agreements represent essential tools for restoring competition to markets where it has been constrained. At any given time there are hundreds of consent decrees pending, *see, e.g., Pending U.S. Consent Decrees*, 7 Trade Regulation Reporter (CCH) ¶ 50,700 (compilation of consent decrees obtained by the federal government), and many more private antitrust settlements that include remedies requiring changes by a dominant participant in the marketplace.

When parties settle antitrust claims through a mechanism intended to enhance competition, the federal court enforcing such a settlement should be permitted to consider the pro-competitive purpose of the settlement.[2]

II. The Tenth Circuit's Decision Failed To Respect The District Court's Fact-Finding Role And Deviates From This Court's Clear Precedents About When A Finding Can Be Clearly Erroneous.

The decision below establishes a precedent that violates this Court's guidance on Rule 52's "clearly erroneous" standard in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985). The Tenth Circuit reversed the district court's fact findings based on testimony from witnesses at a bench trial, concluding that the district court's decision to credit the testimony of one witness over another represented "a legal error." *See* Statement of the Case § 2, *supra* at p. 3.

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[2] In *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994), this Court recognized the value of having federal courts enforce settlements of federal claims. Similarly, federal courts enforce their own consent decrees.

The district court had found the testimony at the bench trial of Flying J's CEO, Phil Adams, to be more persuasive about the parties' intentions for the Trendar License. *See, e.g.*, App., *infra*, 34a-36a (¶¶ 7-11). The district court considered the testimony of Comdata's Chief Counsel, Michael Sheridan, but did not find that testimony persuasive. It held that, to the extent there was a contradiction between the testimony about the parties' intentions, it believed Mr. Adams' expressions of those intentions. App., *infra*, 35a (¶ 9).

Remarkably, the Tenth Circuit reversed the district court's findings based on its own perception of the credibility of the parties' key witnesses – Messrs. Adams and Sheridan from "our review of the record." 405 F.3d at 835, App., *infra*, 21a. The court of appeals presented its interpretation of Mr. Sheridan's testimony about his subjective, personal understanding of the Trendar License and then deemed such testimony to be "substantial evidence that the parties did not intend to implement the dual processing model . . . ." Based on its re-weighing of the testimony, the court of appeals then concluded: "The district court's failure to consider Comdata's evidence was a legal error." 405 F.3d at 835, App., *infra*, 21a.

The Tenth Circuit had no proper basis to subvert the "clearly erroneous" standard by declaring the district court's failure to credit certain testimony about the parties' intent to be "legal error." Proper application of Rule 52's "clearly erroneous" standard is fundamental to the appellate process. The decision below creates confusion for the lower courts by suggesting an appellate court can circumvent the deferential "clearly erroneous" standard by labeling a district court's decision not to credit certain testimony as a "legal error."

This case therefore presents an important instance for this Court to clarify and extend the principles stated in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), and

to confirm that a district court's decision to credit certain testimony over other testimony can never be either clearly erroneous or a legal error.

III. The Tenth Circuit Should Not Have Criticized The District Court For Using The Efficient And Fair Device Of Requesting Proposed Findings From Each Side On Which The Court Could Then Rely In Crafting Its Own Decision In This Complex Case.

Equally important to federal trial judges, besides knowing that appellate courts will defer to their findings of fact that are based on weighing of testimony presented at a bench trial, is allowing them to use efficient procedures to manage their busy dockets. Here, there was no proper basis for the Tenth Circuit's criticism of the district court's efficient use of a procedure to obtain proposed findings from each side following a complex bench trial: "Regrettably this appears to be the case." 405 F.3d at 829, App., *infra* at 11a. Unless this Court acts to clarify the law, the decision below will chill the use of such an efficient procedure by federal trial judges.[3]

The district court below had to issue a ruling concerning the complex process for electronic routing of data from certain trucker fuel card transactions. There was nothing sinister or unfair about having the district court ask each party to submit proposed findings at the end of the trial showing their own rationale, based on the evidence presented, for why the

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[3] The Tenth Circuit is already relying on the decision below to discourage such use of proposed findings. *See MacKenzie v. Denver*, 414 F.3d 1266, 1273 (10th Cir. 2005) ("We are provided minimal assistance by the district court's verbatim adoption of one party's proposed findings of fact and conclusions of law, but this does not change the standard of review.").

court should rule in their favor.[4] There also was nothing wrong with the district court then adopting one party's set of such proposed findings nearly verbatim if it found those findings persuasive. Trial judges are not like novelists who must seek the most original way to present their ideas. Indeed, requiring the trial court to tinker with the wording of either party's proposed findings in a case like this involving complex technology issues represents both a waste of the court's time and an invitation to inadvertent re-phrasing simply for the sake of original prose, that may create problems rather than solve them.

If the trial court had not invited both sides to submit proposed findings, or had done so secretly in an *ex parte* fashion, that raises entirely different fairness issues. Here, the trial court's procedure for requesting proposed findings was fair and appropriate and did not warrant the criticism it received in the decision below.

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[4] The Court requested such findings at the end of the bench trial (Hearing Transcript at 220:14 to 221:8, August 13, 2003):

> THE COURT: Let's get it argued, although I'm probably going to ask you to write two more things, which is another reason to ask you not to write a brief. I'm going to ask each of you to prepare a brief form of proposed order -- and this shouldn't be more than 5 or 7 pages at the most -- relating to the defendant's motion for summary judgment. And then I'm going to ask each of you to prepare proposed findings and conclusions with respect to plaintiffs' motion to enforce.
>
> Now, obviously, if I grant your [summary judgment] motion, Mr. Cooney, the findings and conclusions of both proposals will be irrelevant. If I deny your motions, then both of them may or may not be relevant, but one certainly would be if I deny your motion. Now, I want those simultaneously. I don't want you to have to worry about commenting on each other's work. That would add unnecessarily to this process.
>
> Now, give me a reasonable time frame in which you could prepare those two documents, each of you, and get them to me.

This Court should step in to clarify its rulings about the verbatim use of parties' proposed findings in *United States v. El Paso Nat. Gas Co.*, 376 U.S. 651, 656 (1964), and *Anderson v. City of Bessemer City*, 470 U.S. 564, 572 (1985), and to avoid placing the needless burden of always creating original findings on the already overburdened federal trial courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FILED
United States Court of Appeals
Tenth Circuit
APR 13 2005
PATRICK FISHER
Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

FLYING J INC., a Utah corporation; CFJ PROPERTIES, a Utah partnership; TON SERVICES, a Utah corporation; TFJ, a Utah partnership; NCR; TCH, a Utah corporation,

Plaintiffs-Appellees,

v.

COMDATA NETWORK, INC., a Maryland corporation,

Defendant-Appellant.

No. 03-4262

April 13, 2005

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

(D.C. No. 1:96 CV 66 DAK)

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J. Gordon Cooney, Jr., Morgan, Lewis & Bockius LLP, Philadelphia, Pennsylvania (Gary F. Bendinger and John H. Bogart, Bendinger, Crockett, Peterson & Casey, Salt Lake City, Utah, with him on the briefs), for Defendant-Appellant Comdata Network, Inc.

Before McCONNELL and McKAY, Circuit Judges, and FRIOT, District Judge.*

* The Honorable Stephen P. Friot, of the United States District Court for the Western District of Oklahoma, sitting by designation.

McCONNELL, Circuit Judge.

This appeal is the latest episode in a lengthy antitrust suit brought by Plaintiffs Flying J, Inc., TCH, L.L.C., CFJ Properties, TON Services, Inc., and CFJ (collectively "Flying J") against Defendant Comdata Network, Inc. ("Comdata"). The underlying lawsuit, filed in 1996, arose out of Comdata's alleged monopolization of two product markets related to the U.S. truck stop industry. In May 2001, after nearly five years of discovery and pretrial motions, the parties entered into a settlement agreement. Comdata agreed to pay $49 million in damages and grant Flying J two licenses intended to open the markets at issue. Conflict soon resumed, however, when the parties could not agree about the meaning of one of the two licenses. Aggrieved by what it interpreted as Comdata's refusal to honor one of the licenses, Flying J filed a motion to enforce the settlement agreement in May 2002. The district court determined that Comdata had breached the settlement

agreement and ordered Comdata to implement the license as interpreted by Flying J. Exercising jurisdiction under 28 U.S.C. § 1292(a), we REVERSE. In so doing, we emphasize that it is not our task to determine what would best remedy the underlying antitrust violation, but solely to interpret the agreement reached between the parties, in light of its plain language and the intent of the parties.

I.

Plaintiff Flying J, Inc. owns and operates a nationwide chain of approximately 160 truck stops. Flying J estimates that there are approximately 4000 truck stops in the United States, roughly 1000 of which offer services comparable to its own truck stops. This appeal involves two markets closely related to the trucking industry: point-of-sale systems and trucker fuel cards.

Comdata provides transaction-processing services to the trucking industry. Among other things, it sells the Trendar System, a PC-based point-of-sale system that allows merchants to process customers' card transactions. When the customer's payment card is swiped through the Trendar card reader, Trendar software sends the transaction data to a third-party financial institution for authorization and settlement. Flying J presented evidence in the underlying litigation that Comdata had secured approximately 90% of the point-of-sale systems market by 2001. Virtually every major U.S. truck stop other than Flying J used the Trendar System.

Comdata also issues fuel cards to trucking companies, including a proprietary payment card ("the Comdata Card") and a Comdata MasterCard, referred to as the Comdata Fleet Card. According to Flying J, Comdata cards have dominated the trucker fuel card market for many years, securing a 70% share by 2001.

Proprietary payment cards offer two features relevant to this litigation. The first, called data capture, requires the

truck driver to enter certain data at the time of the fuel purchase, typically including driver identification and odometer readings. The data is relayed in real time to the trucking company, allowing it to monitor the driver's location and activities. The second feature, called purchase control, allows trucking companies to restrict the type and quantity of items that the driver can purchase with the fuel card. A trucking company might, for example, allow its drivers to purchase motor oil and a certain amount of diesel fuel each day but prevent them from purchasing alcoholic beverages, a truck stereo, or enormous bags of pork rinds. Each trucking company can tailor purchase controls to suit its preferences. According to Flying J, data capture and purchase controls are essential to effective management of a long-haul trucking fleet, and they provide the principal incentive for trucking companies to give trucker fuel cards to their drivers rather than ordinary credit cards. Ordinary MasterCards do not have these features.

Comdata and Flying J (through its subsidiaries, TAB and TCH) issue proprietary cards with no logo other than their own, as well as MasterCards. The Flying J propriety card is called the TCH Fuel Card; its MasterCard is called the TCH Mastercard. Comdata MasterCards are called the Comdata MasterCard or Comdata Fleet Card, which mean the same thing. The Comdata and TCH MasterCards can be used either as ordinary MasterCards or as proprietary cards, depending on the arrangements reached with the particular merchant. These are called "dual function" cards.

As a condition of participating in the MasterCard network, MasterCard requires merchants to accept all MasterCards, regardless of the issuer. It is up to the particular merchant to decide whether to accept proprietary cards. In the discretion of the merchant, MasterCard regulations permit use of a "dual function" MasterCard as a proprietary card for a "proprietary account," defined as "an account . . . that is

separate from a MasterCard account and is maintained by a company or organization other than the MasterCard member." MasterCard Bylaws and Rules, October 2002, Rule 6.6, JA 546. The proprietary account rules require a preexisting account, established according to a separate agreement, with each merchant.

Comdata MasterCards and TCH MasterCards therefore must be accepted by all merchants in the MasterCard network. But only if the merchants have an agreement with the issuer do the merchants treat these cards as proprietary cards (meaning that they effectuate the data capture and purchase control features of these cards). If the particular merchant is part of the MasterCard network but has not made any agreement with Comdata or THC, Trendar must process the transaction through the MasterCard network as an ordinary MasterCard transaction, without the data capture or purchase control features. If the merchant has agreed to accept the issuer's proprietary card, the merchant processes the issuer's MasterCard transaction as a proprietary card transaction, meaning that the transaction will be authorized and settled over a private network as opposed to the MasterCard network.

In an ordinary MasterCard transaction, Trendar sends transaction data to the merchant's chosen third-party financial institution, known as the acquirer. The acquirer, through its own system, sends the transaction data through the MasterCard network for authorization by the card issuer's bank and settlement through the MasterCard network. When a dual function card, such as the TCH MasterCard or the Comdata Fleet Card, is processed as an ordinary MasterCard, it does not provide trucking companies with real-time data capture or purchase control because the MasterCard network does not relay data quickly enough.

When Flying J entered the trucker fuel card market in the mid-1990s, it faced two significant barriers to entry.

First, the Trendar System did not accept the TCH Fuel Card. Merchants using Trendar could not process TCH Fuel Card transactions; therefore, Flying J customers could not use the TCH Fuel Card at Trendar locations. Given the ubiquity of the Trendar System, this was a big problem for Flying J.[1] Second, the record shows that Comdata engaged in a campaign to pressure truck stops not to accept the TCH Fuel Card. Prior to the 2001 settlement, Comdata placed over four hundred telephone calls to truck stops and threatened to raise transaction fees on Comdata cards if they agreed to accept the TCH Fuel Card.

In 1996, Flying J filed suit, charging Comdata with violation of the Sherman Act, 15 U.S.C. §§ 1–7, through monopolization of the trucker fuel card market and the point-of-sale systems market. The parties settled in 2001. Comdata agreed to pay $49 million in damages and grant Flying J two licenses: the Comdata License and the Trendar License. In accordance with the parties' request, the district court reserved jurisdiction to enforce the terms of the settlement agreement. See *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994). This appeal concerns only the Trendar License as it pertains to processing the TCH MasterCard at unaffiliated merchants; that is, merchants who have not agreed to accept the proprietary TCH Fuel Card.

The Trendar License grants to TCH a "nonexclusive license . . . to access and use the Trendar System solely for the Permitted Uses." Trendar License Art. 4.1 Permitted uses

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[1] The Federal Trade Commission has found that trucker fuel cards "exhibit strong network effects" so that "[d]emand for a fleet card rises with the number of truck stops that accept the card, which in turn depends on the number of fuel purchase automation systems that accept the card." The FTC's analysis identifies access to the point-of-sale system as the primary factor in the demand for a fuel card. Prior to the settlement, this factor inhibited demand for TCH cards because Trendar did not accept them.

include "access and use of the Trendar System by TCH and its cardholder customers." *Id.* Art. 1. In short, the Trendar License provides TCH access to the Trendar System, and it enables TCH to effect data capture and purchase controls in transactions involving the TCH MasterCard. Pursuant to the Trendar License, Comdata and Flying J configured the Trendar System to accept the TCH Fuel Card. They also configured Trendar to process TCH MasterCards as proprietary transactions if the merchant had agreed to accept the TCH Fuel Card.

This cooperative endeavor soon reached an impasse when Comdata refused to configure Trendar to process TCH MasterCards as proprietary transactions at retail outlets where the merchants had not agreed to accept the TCH Fuel Card. The dispute centers on Article 4.2 of the Trendar License, which provides:

> All TCH Card Transactions processed through the Trendar System, including without limitation TCH Cards bearing a MasterCard or Visa brand, shall be cleared directly through TCH as opposed to any third party network, such as and without limitation the MasterCard network or Visa network, to the fullest extent permitted by the policies, rules, or regulations, as amended from time to time (including their interpretations thereof) by third party network providers.

Trendar License Art. 4.2. Many Flying J competitors, such as Pilot, Petro, and Travel Centers of America, do not accept the TCH Fuel Card. Because truck stops operated by these competitors accept MasterCard, they must accept the TCH MasterCard, but they do so as an ordinary MasterCard transaction, not as a proprietary transaction. Thus, if Trendar processes the TCH MasterCard through the MasterCard network at these locations, the transaction does not provide the trucking company with data capture and purchase control. This restriction on TCH MasterCard processing hinders Fly-

ing J's ability to compete in the trucker fuel card market. Flying J argues that in order for the TCH MasterCard to be fully effective, and therefore attractive to trucking companies, all TCH MasterCard transactions must provide data capture and purchase control.

As discussed more fully below, Comdata interprets the Trendar License as requiring Comdata to configure the Trendar System to treat TCH cards the same way that it treats its own. Accordingly, Comdata was willing to route TCH MasterCard transactions directly through TCH only if TCH secured MasterCard's approval. MasterCard, in turn, refused to agree to financial settlement through private networks except where the merchant entered into a separate agreement with the issuer. Although most merchants have entered into such agreements with Comdata, many have declined to enter such agreements with TCH. According to Comdata, the reason for this discrepancy is that Flying J is a competitor and Comdata (which does not operate truck stops) is not.

In an effort to provide data capture and purchase control in all TCH MasterCard transactions, Flying J filed a motion to enforce the settlement agreement. Flying J argues that at the time of the settlement, Trendar processed the Comdata Fleet Card as a proprietary card; therefore, the Trendar License obligated Comdata to provide universal private processing for TCH MasterCard transactions, regardless of whether the merchant accepts the TCH Fuel Card. In support of its motion to enforce, Flying J presented two models for TCH MasterCard transactions. The primary model replicated the proprietary processing method used for Comdata MasterCards, which processed the entire transaction over a private network. In the alternative, Flying J proposed a split-transaction or dual-processing model, in which TCH would authorize the transaction over a private network, providing data capture and purchase control, but financial settlement would take place on the MasterCard network. Under the

dual-processing model, Trendar would send data to TCH and MasterCard in two different steps, and financial settlement would occur in the same manner as in an ordinary MasterCard transaction.

Flying J's primary model did not conform to MasterCard regulations for proprietary accounts. Joan Hennessey, MasterCard's designated corporate representative, confirmed that Flying J's primary model depicted a proprietary transaction subject to MasterCard's proprietary account rules, which required prior agreement by the merchant. Addressing the dual-processing model, Ms. Hennessey testified that it was not prohibited by MasterCard rules; rather, transmission of authorization data to TCH was "outside of the MasterCard transaction and so it would be outside of our rules." Deposition of Joan Hennessey, JA 1898.

After the Hennessey deposition, Comdata moved for summary judgment, arguing that (1) Flying J failed to secure MasterCard's approval for the primary proposal, and (2) the split-transaction model did not satisfy the requirements of the Trendar License, specifically the requirement that clearing occur "directly through TCH as opposed to . . . the MasterCard network." The court continued the hearing to permit Flying J to ensure compliance with MasterCard procedures. Shortly before the evidentiary hearing resumed, MasterCard confirmed in writing that Flying J's primary model did not meet its proprietary account rules. The dual-processing model fell outside of MasterCard rules. MasterCard noted, however, that it could not require that a merchant participate in the dual-processing arrangement, nor could it require a merchant to provide transaction data to Flying J. MasterCard suggested that the merchant and its acquirer authorize its participation in the dual-processing arrangement.

Because MasterCard rejected its original proposal, Flying J relied exclusively on the dual-processing model at the evidentiary hearing.

The district court held that Comdata had breached its obligations under the Trendar License, including Article 4.2, by failing to implement Flying J's dual-processing model for TCH MasterCard transactions. Order 27, JA 109 (Comdata breached its obligations "by failing promptly to implement a method for direct processing of TCH MasterCard transactions directly through TCH that is acceptable to TCH and does not violate MasterCard rules."). The court found the dual-processing method to be consistent with Comdata's own method of processing the Comdata Fleet Card, rejecting Comdata's argument that proprietary processing of the TCH MasterCard required merchant consent. In its conclusions of law, the court held that Article 4.2's requirement that all transactions be "cleared directly through TCH" included authorization and approval in addition to financial settlement, thereby permitting dual processing. The court granted Flying J's motion to enforce the settlement agreement and ordered Comdata to implement the dual-processing method for TCH MasterCards at all Trendar locations. Comdata appeals.

II.

A.

We review the district court's determination of state law de novo. *See Salve Regina College v. Russell*, 499 U.S. 225, 238–39 (1991); *Grant v. Pharmacia & Upjohn Co.*, 314 F.3d 488, 491 (10th Cir. 2002). We review the district court's findings of fact for clear error. "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 394–395 (1948) (internal quotation marks omitted). "Whether the district court failed to consider or accord proper weight or significance to relevant evidence are questions of law we review de novo." *Harvey ex rel. Blankenbaker v. United Transport Union*, 878 F.2d 1235, 1244 (10th

Cir. 1989) (citing *Pullman-Standard v. Swint*, 456 U.S. 273, 291, 292 (1982)).

As a preliminary matter, Comdata complains that the district court adopted Flying J's proposed findings of fact and conclusions of law almost verbatim. Regrettably, this appears to be the case.[2] The Supreme Court has criticized the verbatim adoption of findings of fact, "particularly when those findings have taken the form of conclusory statements unsupported by citation to the record." *Anderson v. City of Bessemer City*, 470 U.S. 564, 572 (1985). The court's wholesale adoption of one party's proposed findings of fact and conclusions of law provides little aid on appellate review, see *Everaard v. Hartford Accident & Indem. Co.*, 842 F.2d 1186, 1193 (10th Cir. 1986), particularly in the likely event that the adopted submission takes an adversarial stance.[3]

The district court's adoption of a party's proposed findings does not change the standard of review, however. Though not made by the district judge himself, the findings

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[2] Comdata attached to its opening brief a computer-generated comparison of the district court's order and Flying J's proposed findings of fact and conclusions of law. This document shows that, aside from minor, formal alterations (e.g., changing "I find" to "the court finds"), the court's order is an exact copy of Flying J's proposed findings of facts and conclusions of law. See Aplt. Br. Exh. B.

[3] Judge J. Skelly Wright warned district judges that

> lawyers, and properly so, in their zeal and advocacy and their enthusiasm are going to state the case for their side in these findings as strongly as they possibly can. When these findings get to the courts of appeals they won't be worth the paper they are written on as far as assisting the court of appeals in determining why the judge decided the case.

Seminars for Newly Appointed United States District Judges 166 (1963), quoted in *El Paso Natural Gas*, 376 U.S. 651, 656 n.4 (1964).

"are formally his; they are not to be rejected out of hand, and they will stand if supported by evidence." *United States v. El Paso Nat. Gas Co.*, 376 U.S. 651, 656 (1964) (citing *United States v. Crescent Amusement Co.*, 323 U.S. 173, 184–85 (1944)); *see also Sanpete Water Conservancy Dist. v. Carbon Water Conservancy Dist.*, 226 F.3d 1170, 1177 n.7 (10th Cir. 2000) ("[E]ven if we believed the district court improperly adopted [the] proposed findings without reasoned consideration, we would still review the district court's decision under the clearly erroneous standard."). We therefore review the court's findings of fact for clear error.

For its part, Flying J suggests that the district court's familiarity with this case entitles its order to greater deference on appeal. See, e.g., *Stone v. City and County of San Francisco*, 968 F.2d 850, 856 (9th Cir. 1992); *Ferrell v. Pierce*, 743 F.2d 454, 461 (7th Cir. 1984). We reject this suggestion as well. It is true that the district court hosted this litigation for almost five years, and we have no doubt that it became excruciatingly well-acquainted with the long-distance trucking industry and the details of Flying J's antitrust claim. The record shows, however, that the question central to this appeal—whether Article 4.2 was intended to authorize a dual-processing model for TCH MasterCard transactions—did not arise until shortly before the evidentiary hearing, well after the parties settled their claims in the underlying suit. Even assuming that the district court's familiarity could increase the already substantial deference owed to findings of fact under the clear error standard, the rationale for such deference would not apply to the issue before us.

B.

This case requires us to reconcile two competing interpretations of the mandate that all TCH Card transactions "shall be cleared directly through TCH as opposed to any third party network . . . to the fullest extent permitted by . . . third party network providers." Trendar License Article 4.2.

Comdata contends that the district court erred by failing to determine whether the contract was ambiguous, by refusing to give the term "cleared" its prevailing meaning in the financial industry, and by disregarding Comdata's evidence of intent. Comdata claims further that the district court's ultimate interpretation of the contract was clearly erroneous. Flying J responds that Comdata's interpretation of the contract is unreasonable and, in the alternative, that the court's factual findings are supported by the evidence. We hold that the court interpreted the term "cleared" under an incorrect legal standard, that differences in meaning of the term render Article 4.2 ambiguous, that accordingly the court should have considered Comdata's proffered evidence, and that in light of that evidence the court's factual findings regarding the meaning and intent of the contract are clearly erroneous.

III.

We begin with an argument about whether the district court found the contract ambiguous. Comdata contends that the district court failed to make this threshold determination. Flying J responds that the court explicitly found Comdata's interpretation of the contract unreasonable, and that it follows that, if one of the two possible interpretations is unreasonable, Article 4.2 is not ambiguous. Fortunately, de novo review provides a narrow escape from this tangle of compound ambiguity. Because Flying J and Comdata each advance plausible interpretations of Article 4.2, we find the disputed language to be ambiguous.

A.

The general rules of contract interpretation under state law apply to settlement agreements. *See Sackler v. Savin*, 897 P.2d 1217, 1220 (Utah 1995).[4] When a court interprets a contract, it must make a threshold determination whether the contract is ambiguous. *See Peterson v. Sunrider Corp.*, 48 P.3d 918, 925 (Utah 2002). A contract is ambiguous if it supports more than one reasonable interpretation. *Id; see also Nielsen v. Gold's Gym*, 78 P.3d 600, 601 (Utah 2003). Utah law is unsettled on the issue whether the court may go beyond the four corners of the contract to determine whether the contract is ambiguous. *Compare WebBank v. Am. Gen. Annuity Serv. Corp.*, 54 P.3d 1139, 1145 (Utah 2002) ("If the language within the four corners of the contract is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law."), *and Central Fla. Investments, Inc. v. ParkWest Associates*, 40 P.3d 599, 605 (Utah 2002) ("We first look to the four corners of the agreement to determine the intentions of the parties."), *with Nielsen*, 78 P.3d at 601 (in determining ambiguity, the court may consider "[r]elevant, extrinsic evidence of the facts known to the parties at the time they entered the [contract])"(brackets in original) (quoting *Yeargin, Inc. v. Auditing Div. of Utah State Tax Comm'n*, 20 P.3d 287 (Utah 2001)), *Peterson*, 48 P.3d at 918 ("In determining whether a contract is ambiguous the court is not bound to consider only the language of the contract."), and *Ward v. Intermountain Farmers' Ass'n*, 907 P.2d 264, 268 (Utah 1995) ("When determining whether a contract is ambiguous, any relevant evidence must be considered."). Because both parties follow the expansive view, we assume that the court may look beyond the four corners of the contract to determine ambiguity.

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[4] The Trendar License calls for the application of Tennessee law. The Settlement Agreement calls for the application of Utah law. Both

Ambiguity is a question of law. *Id.* If the contract is ambiguous, the court can admit extrinsic evidence of intent to clarify the meaning of ambiguous terms. *Id.* If the court determines the contract to be ambiguous and admits extrinsic evidence, the court's interpretation of a disputed term is a finding of fact reviewed for clear error. *Nielsen*, 78 P.3d at 601 (citing *Kimball v. Campbell*, 699 P.2d 714, 716 (Utah 1985)).

Flying J contends that consideration of extrinsic evidence transforms the threshold determination of ambiguity into a finding of fact. That is not an accurate statement of Utah contract law. The cases cited by Flying J involve the admission of extrinsic evidence to determine the meaning of ambiguous terms, a question of fact. *See Valley Improvement Ass'n, Inc. v. United States Fidelity & Guaranty Corp.*, 129 F.3d 1108, 1115 (10th Cir. 1997); *Cavic v. Pioneer Astro Indus., Inc.*, 825 F.2d 1421, 1424 (10th Cir. 1987) ("[W]hen the trial court resorts to extrinsic testimony to ascertain the meaning of the contractual terms, the interpretation is factual."). In its threshold determination of ambiguity, however, the court decides whether there is anything for the trier of fact to find. Even if the court refers to extrinsic evidence to make that determination, contractual ambiguity presents a question of law that we review de novo. *See Peterson*, 48

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parties agree with the district court's determination that there is no material conflict between Tennessee and Utah contract law. Because the parties do not raise a choice-of-law issue, we construe and interpret the Trendar License under Utah law. *See In re Korean Airlines Disaster*, 932 F.2d 1475, 1495 (D.C. Cir. 1991) ("Unlike jurisdictional issues, courts need not address choice of law issues *sua sponte*."), *cited in GBJ Corp. v. E. Ohio Paving Co.*, 139 F.3d 1080, 1085 (6th Cir. 1998) (declining to undertake a full most-significant-contacts inquiry where the parties acquiesced in the application of New York law); *Railway Express Agency, Inc. v. Super Scale Models, Ltd.*, 934 F.2d 135, 139 (7th Cir. 1991) ("Where the law of the two states is essentially the same, we apply the law of the forum state.").

P.3d at 925. We now explain our conclusion that Article 4.2 is ambiguous.

B.

Comdata maintains that the language of Article 4.2 does not permit dual or split transactions through Trendar, but requires that financial settlement, authorization, and approval occur over the same network. It argues that the technical meaning of the term "cleared" for purposes of financial transactions, and in particular as reflected in MasterCard glossary, refers exclusively to financial settlement. The MasterCard glossary defines "clearing" as "[t]he process of exchanging financial transaction details between an acquirer and an issuer to facilitate posting of a cardholder's account and reconciliation of a customer's settlement position." MasterCard, Bankcard Glossary, JA 1151. Relying on this definition, Comdata argues that split transactions violate the requirement that all transactions be cleared directly through TCH as opposed to a third-party network. Comdata thus interprets "to the extent permitted" to mean in as many transactions as permitted by the third-party network provider.

Flying J urges reliance on a more general definition of "clear" found in the Merriam-Webster online dictionary: "5a: to submit for approval <*clear* it with me first> b: AUTHORIZE, APPROVE <*cleared* the article for publication>: as (1): to certify as trustworthy <*clear* a person for classified information> (2): to permit (an aircraft) to proceed usually with a specified action." Merriam-Webster Online Dictionary, at http://www.m-w.com/cgi-bin/dictionary, *cited in* Order 22, JA104 ("These meanings include the functions of authorizing and approving, in addition to financial settlement."). If clearing is defined in this way, Trendar can transfer authorization and approval data "directly through TCH," while financial settlement takes place in the MasterCard network. Thus, even if a merchant has not agreed to accept the TCH Card, Trendar could send authorization and approval data through a

private network, thereby permitting data capture and purchase control on all TCH MasterCard transactions. Thus, Flying J reads "to the extent permitted" to mean *as much of the transaction* as permitted by MasterCard.

The language of Article 4.2 will bear either party's interpretation. Comdata interprets the provision consistently with its own arrangement with MasterCard. Though Flying J's interpretation is not based on any pre-existing processing model, it too reflects a plausible reading of Article 4.2, it does not violate any specific MasterCard regulation, and it is technically feasible.[5]

The district court agreed with Flying J. The court considered itself bound to "construe contract language in a way that gives effect to the ordinary meaning of words unless the evidence indicates the parties intended to adopt a special meaning." Order 22, JA 104. Finding no evidence demonstrating that the parties intended to define "clear" according to its technical meaning in financial transactions, as illustrated by the MasterCard glossary, the court considered itself bound by the "plain meaning." The district court looked to the dictionary as evidence of plain meaning, concluding that "clear" "include[s] the function of authorizing and approving, in addition to financial settlement." *Id.* The court reasoned that if clearing involves multiple functions, then Article 4.2 permits different aspects of clearing to occur over different networks. The court rejected Comdata's argument that Article 4.2 did not authorize split transactions as "an unreasonable interpretation of the agreement's language that is incon-

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[5] In a letter submitted after briefing, *see* Fed. R. App. P. 28(j), Comdata informs the Court that "in the early-to-mid 1990's, Trendar was configured to process a narrow category of non-MasterCard transactions in two steps." Comdata denies, however, that Trendar has ever split MasterCard transactions.

sistent with the parties' intentions for the Trendar License." Order 24, JA 106.

We do not agree with the district court's application of the plain meaning rule. Under Utah law, if "the contract is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law." *Green R. Canal Co. v. Thayn*, 84 P.3d 1134, 1141 (Utah 2003); *see also Grynberg v. Questar Pipeline Co.*, 70 P.3d 1, 10 (Utah 2003) ("This court interprets unambiguous contracts as a matter of law."). Where there are two plausible meanings—one from ordinary speech and one from the specialized terminology of the relevant industry—the contract is not unambiguous and the plain meaning rule does not apply. *See R&R Energies v. Mother Earth Indus.*, 936 P.2d 1068, 1074 (Utah 1997) ("A specialized meaning would create ambiguity because at least two plausible meanings, one 'plain' and one 'specialized,' would exist."). Giving "cleared" its ordinary dictionary meaning therefore requires a preliminary determination that Article 4.2 is unambiguous.

Even if the plain meaning rule controlled, the definition adopted by the district court is less than plain in the context of Article 4.2. The Restatement of Contracts provides that unless the parties manifest a different intention, "technical terms and words of art are given their technical meaning when used in a transaction within their technical field." Restatement (Second) of Contracts § 201(3)(b)[6]; *see also Hol-*

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[6] The Utah Supreme Court has not specifically adopted Restatement (Second) of Contracts § 201; however, it has consistently adopted other Restatement provisions. *See, e.g., Andreini v. Hultgren*, 860 P.2d 916, 921 (Utah 1993) (adopting the standards of duress provided in Restatement Second §§ 175, 176); *Southeastern Equip. Co. v. Mauss*, 696 P.2d 1187, 1188 (Utah 1985) (noting that Utah recognizes promissory estoppel as defined by § 90); *Bitzes v. Sunset Oaks, Inc.*, 649 P.2d 66, 68–

land v. Brown, 394 P.2d 77, 78–79 (Utah 1964) ("When terms used in a contract appear to have a specialized meaning, they must be understood in accordance with the particular connotation they may have acquired in such transactions."). Considering that this lawsuit focuses specifically on MasterCard transactions, MasterCard's own definition might reasonably be consulted to determine the plain meaning of the term in its immediate context. At the very least, Comdata's reliance on the MasterCard glossary should have insulated its interpretation from the charge of unreasonableness.

Flying J does not dispute that the verb "clear" has a specialized meaning in the financial industry; rather, it contends that such usage would be unreasonable in the context of an antitrust settlement. This is an unduly narrow characterization of the issue. It is true that this dispute arises out of an antitrust claim, but the antitrust claim involved financial transactions in the trucker fuel card market. Both parties litigate, at least in part, in their capacity as providers of financial services. The fact that this is an antitrust case therefore does not render irrelevant the specialized meaning of "cleared" in the financial industry.

C.

Interpreting "cleared" in light of its industry-specific meaning does not, however, entirely resolve the ambiguity in Article 4.2. Flying J argues that the Trendar License sanctions dual processing even if "cleared" refers exclusively to financial settlement. Substituting "financial settlement" for "cleared," Article 4.2 requires that all transactions "be [financially settled] directly through TCH as opposed to any third party network . . . to the fullest extent permitted . . . by third party network providers." If MasterCard does not per-

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70 (Utah 1982) (explaining that Utah followed the doctrine of frustration of purpose set forth in § 265).

mit financial settlement over the TCH network, the transaction can be settled over the MasterCard network, but nothing in MasterCard's rules, and therefore nothing in Article 4.2, prevents the transfer of other data over the TCH network. Flying J argues, in other words, that if "cleared" refers only to financial settlement, Article 4.2 does not address dual processing; if it does not address it, it does not prohibit it; and if it does not prohibit it, the Trendar License permits dual processing.

We turn, then, to extrinsic evidence of the intended meaning of Article 4.2.

1.

The district court found that Flying J intended the Trendar License to allow TCH cards "effectively to compete with Comdata's proprietary trucker fuel card, including the Comdata MasterCard Fleet Card." Order 5, JA 87. The court found that Comdata failed to produce contradictory evidence:

> Comdata did not present evidence at the hearing indicating that the parties did not intend to accomplish this result through the Trendar License. Mr. Sheridan participated in negotiation of the Trendar License but did not offer testimony specifically contradicting that explanation of the parties' intent.

Order 5–6, JA 87–88. Based on what it perceived as a lopsided evidentiary record, the court concluded that

> enforcing the Trendar License in a way that requires TCH MasterCard Fleet Card transactions to be cleared directly through TCH, as opposed to the MasterCard I-Net network, at truck stops that do not currently accept the TCH proprietary card as a method of payment . . . is consistent with the reasonable expectations of the parties at the time they entered into their Settlement Agreement and the Trendar License in May 2001.

Order 6, JA 88. The court rejected Comdata's position, which it characterized as "an unreasonable interpretation of the agreement's language that is inconsistent with the parties' intentions for the Trendar License." Order 24, JA 106. We do not agree with this characterization of the record.

In our review of the record, Comdata produced substantial evidence indicating that it did not contemplate or intend that the Trendar License would lead to proprietary processing of TCH MasterCards at unaffiliated merchants, much less that this would be accomplished through a dual-processing model. Comdata's chief counsel, Michael Sheridan, testified that Comdata intended to replicate its own processing model for Flying J: "I thought, Your Honor, that we were allowing them, if MasterCard approved, to send the entire transaction to them and have a proprietary network just like we have." Sheridan Testimony, JA 1632. He specifically disavowed any intention to authorize split transactions: "Section 4.2 was not intended to, and does not, require Comdata to reconfigure the Trendar system to route part of the transaction through TCH and clear other parts of the transaction through the MasterCard network." Sheridan Declaration, JA 1141–42. *See also id.* at 1141 ("At no time did I contemplate that Comdata would be required to configure Trendar to route part of a transaction through TCH and another part of the transaction through the MasterCard network."). This constitutes substantial evidence that the parties did not intend to implement the dual processing model, which did not exist at the time the settlement was negotiated and is different from the model used for Comdata's own proprietary cards. The district court's failure to consider Comdata's evidence was a legal error. *See Blankenberger*, 878 F.2d at 1244.

2.

The district court found that Flying J's interpretation of the contract would promote the pro-competitive goals of the Sherman Act by creating a network of truck stops where

TCH cards provided data capture and purchase control. In the district court's view, this "pro-competitive intent" encompassed data capture and purchase control for all TCH MasterCard transactions at all U.S. truck stops using the Trendar System. It thus concluded that Comdata was bound to implement dual-processing unless it could show that the parties did not intend to restore competition to the trucker fuel card market.

We have no occasion to question the district court's conclusion that Flying J's interpretation of Article 4.2 would better promote the competitive objectives of the antitrust laws. But the issue at this stage is not what would be the most effectual remedy for a proven antitrust violation; the issue is what the parties agreed to in settling the litigation. The parties did not frame their settlement in terms of maximizing competition, but in terms of a specific procedure for processing credit card transactions. The record is unequivocal on one point: both Flying J and Comdata intended the Trendar License to provide Flying J with data capture and purchase control similar to the so-called "Comdata model." JA 1119–20, 1690 (Adams); JA 1632 (Sheridan); Appellee's Br. 33; Appellant's Br. 34. Flying J makes no attempt to dispute this. Appellee's Br. 33. Comdata's own cards were, and are, processed as single transactions. The most straightforward interpretation of Article 4.2, therefore, is that TCH MasterCard transactions would be processed in the same way.

At least at the time of the evidentiary hearing, Comdata and Flying J had different ideas of what the Comdata model entailed. Comdata thought that it referred to a particular procedure: access to the Trendar System, plus data capture and purchase control at affiliated merchants. The main goal of the license, in Comdata's view, was to provide TCH with access to the Trendar System:

> Comdata . . . understood that the Plaintiff's goal in litigation and settlement was to have the TCH card accepted

> over the Trendar System and cleared directly through TCH, if permitted by MasterCard. Indeed, the very title to the operative agreement in this matter is: "Trendar License (TCH Card Access to Trendar)."

Sheridan Declaration, JA 1134. Comdata did not view the license as intended "solely to provide TCH with full data capture, regardless of how transactions were to be cleared or regardless of whether TCH obtained MasterCard's consent." *Id.* Neither did Comdata anticipate that the Trendar License would require Trendar to split transactions.

Flying J argues that the Comdata model was associated solely with a result: data capture and purchase control at all Trendar locations that accepted MasterCard. Flying J apparently believed that this result was "comparable to the direct processing of the Comdata MasterCard Fleet Card." Order 17, JA 99. Flying J's understanding depended on the assumption that Comdata obtained data capture and purchase control in Fleet Card transactions without merchant consent. *See* Declaration of J. Phillip Adams para. 18, JA1118 ("My understanding both in May 2001 and now, is that Comdata did not then, and does not now, have specific agreements with truck stops authorizing such private processing of Comdata MasterCard Fleet Card transactions."). Flying J defends this assumption by reference to the testimony of Comdata's General Counsel, who indicated that Comdata's agreements with truck stops do not specifically notify the merchant that Trendar processes the Comdata Fleet Card over Comdata's private network. Based on this testimony, the district court found that

> Comdata does not have written agreements in place with the major U.S. truck stops that accept its card (including Pilot, Petro, and Travel Centers of America) by which Comdata explicitly informs those truck stops that it will be privately processing Comdata MasterCard Fleet Card transactions outside the MasterCard I-Net network or

> explicitly obtains their permission for such private processing. Instead, the truck stop merchant agreements on which Comdata relies to argue that it has contracts for private card processing in place with truck stops, are the standard form 'service center' agreements by which truck stops agree to accept Comdata products including Comdata's proprietary (non-MasterCard) card.

Order 18, JA100. The district court found "no evidence that Comdata has such written authorizations in place for its own direct processing through Trendar of MasterCard Fleet Card transactions." Order 17, JA 99. If Comdata did not have specific agreements authorizing proprietary Comdata Fleet Card transactions, Flying J argues it also need not obtain merchant consent to proprietary TCH MasterCard transactions.

Flying J's reliance on the lack of an explicit agreement with the merchant attempts to sidestep the evidence that Comdata Fleet Cards provided data capture and purchase control only when the merchant had agreed to accept its proprietary cards. MasterCard's representative testified that Comdata processed transactions outside the MasterCard network based on the exception for proprietary accounts. MasterCard Bylaws and Rules, October 2002, Rule 6.6, JA 546. The proprietary account exception required that the merchant agree to accept the card issuer's proprietary card before the issuer's fleet card could be processed privately. *See id.* Rule 6.6.1, JA 546; Rule 8.05, Dec. 2001, JA 539; Hennessy Deposition, JA 1902. There was no contrary evidence. It follows that Comdata did not enter into *specific* agreements to process Comdata Fleet Cards over its own network because it would have been redundant to do so. The merchant had already agreed to accept Comdata's proprietary card; therefore, it had consented to proprietary processing. The district court's finding that Comdata provides data cap-

ture and purchase control in MasterCard transactions without notice to merchants is thus without support in the record.

Flying J's response—that Comdata did not and cannot show a single merchant that does not accept the Comdata Card—misses the point. Under the circumstances, widespread, even universal, acceptance of Comdata's proprietary card does not show that Comdata did not have to obtain the merchant's consent to get proprietary processing; it proves only that Comdata always got it. Comdata offers an explanation for the Comdata Fuel Card's popularity: unlike Flying J, Comdata is not a competitor in the truck stop industry, and unaffiliated merchants therefore are more willing to accept its card. Far from proving Flying J's point, this supports the inference that merchant consent was central to Comdata's commercial arrangements and therefore to the Comdata model. Flying J does not produce any evidence to the contrary. The court therefore clearly erred in finding that the parties intended the Trendar License to have the meaning urged by Flying J.

3.

If Comdata's processing model involved unitary processing and merchant consent, the meaning of Article 4.2 depends in part on whether Flying J knew or had reason to know of these characteristics at the time of the settlement agreement. Flying J and Comdata attribute different meanings to Article 4.2, creating an apparent misunderstanding regarding a key term of the Trendar License. Where the parties assign different meanings to a term,

> it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made
>
> (a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or

> (b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.

Restatement (Second) of Contracts § 201(2). If Flying J knew or had reason to know that Comdata understood Article 4.2 to mean that Trendar would process TCH MasterCards in the same manner as Comdata Fleet Cards—through unitary transactions—then Article 4.2 must be interpreted accordingly.

At the time of the settlement, neither party had reason to expect that Article 4.2 would result in a dual-processing arrangement. Flying J concedes that it did not conceive of the dual-processing model until after the parties entered the Trendar License. Kevin Farnsworth, a TCH employee who was involved in programming Trendar to accept TCH cards, testified that Flying J originally requested that the TCH MasterCard be processed exclusively through the TCH network. Testimony of Kevin W. Farnsworth 167:11–25, JA 1588. Ted Jones, the President of TCH, testified that he was not aware of any split transactions over the Trendar System. Testimony of Ted David Jones 149:9–21, JA 1570. At the time of the settlement, therefore, Flying J expected that TCH MasterCards would be processed exclusively through TCH rather than split between the TCH and MasterCard networks.

Comdata likewise had reason to expect that the Trendar License would be limited to unitary processing based on its own arrangement with MasterCard. As previously noted, MasterCard's representative testified that Comdata processed transactions outside the MasterCard network based on the exception for proprietary accounts. MasterCard Bylaws and Rules, October 2002, Rule 6.6, JA 546. The proprietary account exception required that the merchant agree to accept the card issuer's proprietary card before the issuer's fleet card could be processed privately. *See id.* Rule 6.6.1, JA 546; Rule 8.05, Dec. 2001, JA 539; Hennessy Deposition, JA

1902. Thus, according to MasterCard, Comdata's own procedures are consistent with the unitary processing model. Comdata's arrangement clarifies the ambiguous language of Article 4.2.

Flying J counters with the argument that the parties intended to achieve a particular result; therefore, the particulars of Comdata's own processing model do not matter. Flying J draws a distinction between the actual Comdata model and an arrangement similar to the Comdata model, which would provide Flying J with "the same real-time data capture and purchase control functionality for its TCH MasterCard at truck stop locations that use the Trendar System that Comdata was providing to the Comdata MasterCard Fleet Card through the Trendar System." Adams Declaration, JA 1119–20; *see also* JA 1690 ("[W]hat we contemplated in the settlement was that we were going to be able to process transactions the way Comdata was processing Comdata MasterCard transactions.").

There is evidence in the record, however, that suggests Flying J knew or had reason to know that Comdata intended Article 4.2 transactions to replicate the procedure used in Comdata Fleet Card transactions. In his declaration submitted to the district court, Flying J's president described his knowledge of Comdata's arrangement:

> As of May 2001, I knew that the Trendar system was programmed to process Comdata MasterCard Fleet Card transactions outside the MasterCard network. Thus, . . . the Trendar system would automatically route the transaction directly to Comdata—instead of through MasterCard's network—so it could be cleared directly through Comdata just like transactions involving the Comdata Fuel Card.

Declaration of J. Phillip Adams, April 4, 2003, at 3, JA 842. Mr. Adams's statement supports the inference that Flying J actually understood "direct" clearing—the term used in Arti-

cle 4.2—to be equivalent to exclusive clearing—the meaning urged by Comdata. In other words, it understood "direct" clearing to mean that the entire transaction would be routed through Comdata's network, not split between different networks. At the very least, Flying J had reason to know Comdata's intended meaning. Even if Flying J thought that Article 4.2, as written, entitled it to data capture and purchase control in all TCH MasterCard transactions, regardless of merchant consent, there is evidence that it had reason to know Comdata believed the contrary.

Both parties anticipated that Article 4.2 would follow the Comdata model of MasterCard processing. The record shows that Comdata's arrangement with MasterCard followed a specific MasterCard policy for proprietary accounts, which involved unitary transactions and merchant consent. There is evidence that Flying J had reason to know that Comdata intended these limits to apply to Article 4.2. Accordingly, we hold that the district court clearly erred in finding that the parties intended Article 4.2 to require proprietary TCH MasterCard transactions at all Trendar locations, regardless of merchant consent, by any feasible means.

IV.

For the reasons stated above, we REVERSE the district court's order and REMAND the case for further proceedings consistent with this opinion.

No. 03-4262, *Flying J Inc., et al. v. Comdata Network, Inc.*

McKAY, Circuit Judge, dissenting:

I have a much simpler view of this case than the majority. This case is a dispute over a claim that Comdata violated antitrust laws by restricting Flying J's access to the market. On the eve of trial, because Comdata realized it was in jeopardy of an adverse judgment, it agreed to pay forty-nine mil-

lion dollars to Flying J to compensate for past violations. In addition, to rectify future restrictions on market entry, it entered into the license that is the subject of dispute on appeal. As the majority points out, certain sections of the settlement agreement are ambiguous. Whatever their private post-hoc perception of the license, the language the parties chose does not itself tell the court which perceptions they intended.

What we do know is that the overall purpose of the license was to open access to the market. After hearing extensive evidence about the undisclosed understanding of each of the parties, the district court opted to find Flying J's understanding to be the more reasonable one. It then ordered a remedy that most effectively implemented that perception. Our job on appeal is to determine whether that finding is *clearly erroneous*. In my view, the parties' evidence lends itself to either party's interpretation. The district court's selection of the interpretation that favors optimal opening of the competitive market seems to me to be eminently reasonable and supported by the record. Resolving any doubt in favor of the purpose of the antitrust statutes strengthens this conclusion. I see no reason to criticize the trial court's judgment. *See* DUCivR 54-1(c); *Blankenship v. Herzfeld*, 721 F.2d 306, 310 (10th Cir. 1983); *Ramey Constr. Co. Inc. v. Apache Tribe of Mescalero Reservation*, 616 F.2d 464, 467 (10th Cir. 1980). I would affirm the trial court's decision.

APPENDIX B: September 25, 2003 Opinion Of The United States District Court for the District of Utah: *Flying J Inc. v. Comdata Network, Inc.*, 2003 U.S. Dist. LEXIS 25684 (D. Utah Sept. 25, 2003).

[* paging is from LEXIS version of court opinion]

Filed

September 25, 2003

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, NORTHERN DIVISION

FLYING J INC. et al.,

Plaintiffs,

v.

COMDATA NETWORK, INC. et al.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

Case No. 1:96CV0066K

This matter is before the court on (1) Plaintiffs' Motion to Enforce Settlement Agreement; (2) Comdata's Motion to Dismiss and Enjoin Further Pursuit of This Matter in Violation of the Applicable Arbitration Provision; and (3) Comdata's Motion for Summary Judgment, or, in the Alternative,

Summary Denial of Plaintiffs' Motion to Enforce; (4) Comdata's Motion to Enforce Protective Order; and (5) Flying J's Motion to Compel Documents.[1] On August 13, 2003, the court held an evidentiary hearing on Plaintiffs' Motion to Enforce Settlement and heard oral argument on all the other motions. At the hearing, the Flying J Plaintiffs were represented by Gregory J. Kerwin and Casey K. McGarvey, and Comdata was represented by J. Gordon Cooney and John Bogart. The court, having heard the testimony of witnesses, reviewed the evidence, and considered the arguments of counsel, and being fully advised now makes and [*4] enters its Findings of Fact and Conclusions of Law and Order.

I. FLYING PLAINTIFFS' MOTION TO ENFORCE SETTLEMENT AGREEMENT AND COMDATA'S MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, SUMMARY DENIAL OF PLAINTIFFS' MOTION TO ENFORCE

The court grants Flying J Plaintiffs' Motion To Enforce May 2001 Settlement Agreement and denies Comdata's "Motion for Summary Judgment, or, in the Alternative, Summary Denial of Plaintiffs' Motion to Enforce" based on the Findings of Fact and Conclusions of Law set forth below.

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[1] At the hearing on this matter, Comdata withdrew its Motion to Dismiss and Enjoin Further Pursuit of This Matter in Violation of the Applicable Arbitration Provision.

FINDINGS OF FACT[2]

[*5]

A. The Parties' May 2001 Settlement Agreement

1. The parties entered into a Settlement Agreement and Release ("Settlement Agreement") in May 2001 by which they settled Plaintiffs' antitrust and tort claims that were set forth in a Fifth Amended Complaint filed with this court on March 13, 2001. Plaintiffs' claims included claims for monopolization and attempted monopolization under Section 2 of the Sherman Act for two product markets described in Paragraph 15 of the Complaint as the Trucker Fuel Card Market and POS Systems Market. The allegations concerning the Trucker Fuel Card Market concerned alleged monopolization and attempted monopolization by the Comdata trucker fuel card. The allegations concerning the POS Systems Market concerned alleged monopolization and attempted monopolization through Comdata's Trendar POS device located in U.S. truck stops.

2. At the time of the May 2001 settlement, the court had scheduled a jury trial on the claims in this case to begin in June 2001.

3. Under the terms of the May 2001 Settlement Agreement, Comdata agreed to pay $ 49 million to Plaintiffs for alleged past harm, and also agreed to enter into two license agreements, which [*6] the parties called the Trendar License and Comdata License. The current dispute concerns Comdata's obligations under the Trendar License dated as of May 21, 2001.

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[2] Based on the findings discussed below, the court concludes that Comdata has failed to demonstrate that there is no genuine issue as to any material fact, and thus, Comdata is not entitled to summary judgment.

4. In these findings, the court refers to the TCH "proprietary" card as a trucker fuel card issued by TCH to trucking companies and their drivers that affords cardholders features including data capture and purchase controls. When the data capture feature of the fuel card is activated and capable of being used at a particular point-of-sale device-like the Trendar device-that is programmed to allow it to fully function, the truck driver must enter certain data at the time he or she purchases fuel at a truck stop (e.g., such data as driver identification, odometer for the truck and trailer, etc.). Those data are relayed almost instantaneously by the truck stop point-of-sale system through TCH back to the driver's trucking company and assist that company in tracking the driver's movement and activities. When the purchase control feature is similarly activated, the trucking company enforces, through the TCH fuel card, restrictions concerning the type and quantity of goods and services that the truck driver can purchase using [*7] the fuel card. Thus, when purchase controls are functioning, the fuel card might permit the driver to purchase 150 gallons of diesel fuel each day and motor oil, but block use of the card to pay for a truck stereo or alcoholic beverages, depending on the trucking company's preferences for drivers' use of their TCH fuel cards.

5. The court refers in these findings to the "TCH MasterCard Fleet Card" as a type of TCH proprietary card that bears a MasterCard logo, whose transactions can be processed as both a TCH proprietary card (with data capture and purchase control functionality), and a MasterCard (with no data capture or purchase control functionality when processed solely through MasterCard's I-Net system).

6. Merchants who agree to accept MasterCard as a method of payment agree to "honor all" MasterCards so that a merchant who honors one type of MasterCard should honor all types of MasterCard. Hearing Exh. H: Hennessey Depo. at p. 8 In. 11-23 (January 17, 2003).

7. Based on the uncontroverted testimony of J. Phillip Adams, the court finds that the Trendar License represented an important part of the consideration that Plaintiffs reasonably expected to receive under [*8] the Settlement Agreement. See, e.g., Adams Decl. PP 13-14. According to Mr. Adams, Plaintiffs intended that the Trendar License would allow TCH to have: a) TCH proprietary card transactions cleared directly through TCH over Trendar POS terminals at truck stops that agree to accept the TCH proprietary card as a method of payment; and b) TCH MasterCard Fleet Card transactions cleared directly through TCH, as opposed to the MasterCard I-Net network, at truck stops that have Trendar terminals and do not accept the TCH proprietary card as a method of payment but do accept MasterCard as method of payment. Adams Decl. PP 21-24. Mr. Adams intended for the TCH MasterCard to be processed in a manner similar to the Comdata MasterCard Fleet Card at truck stops with the Trendar device. Adams Decl. PP 18-21. Mr. Adams saw such processing of the TCH MasterCard as a way for TCH customers to use their TCH MasterCard to purchase fuel at major truck stop chains like Pilot, Petro, and TA, with data capture and purchase control functionality for such transactions regardless of whether those truck stops accept other TCH proprietary cards. Adams Decl. PP 22-24. Mr. Adams sought such processing of the TCH [*9] MasterCard in light of the evidence then existing of Comdata's efforts to pressure such truck stops not to accept TCH's proprietary cards.

8. According to Mr. Adams' testimony, Plaintiffs intended that the Trendar License, including its provisions providing for direct clearing of TCH MasterCard transactions by TCH, would make it possible for TCH's card effectively to compete with Comdata's proprietary trucker fuel card, including the Comdata MasterCard Fleet Card. This would occur because, at any U.S. truck stop that accepts MasterCard and uses the Trendar point-of-sale device, the TCH MasterCard Fleet Card could be used as a method of payment and

TCH could provide purchase control and data capture functionality to the TCH cardholder in connection with such transactions. That pro-competitive intent is also evident from the Trendar License's explicit incorporation by reference in Article I of the terms and conditions of the Federal Trade Commission Decision and Order dated April 5, 2000 in *In re matter of Ceridian Corporation*, Docket No. C-3933, which order is attached to the Trendar License and plainly was intended to restore competition to markets in which the FTC believed competition [*10] had been suppressed.

9. The language of the Trendar License, including Articles II, III, and IV, is consistent with Mr. Adams' expressions of Plaintiffs' intentions. Comdata did not present evidence at the hearing indicating that the parties did not intend to accomplish this result through the Trendar License. Mr. Sheridan participated in negotiation of the Trendar License but did not offer testimony specifically contradicting that explanation of the parties' intent. To the extent there is a contradiction in the testimony about the parties' intentions, the court finds that the language of the Trendar License, and particularly the definition of "TCH Cards" in Article I (p. 2) to include the TCH MasterCard products, is consistent with Mr. Adams' expressions of those intentions. Ms. Graybill admitted on cross-examination that she was not involved in negotiation of the Trendar License. Therefore she is not in a position to testify about Comdata's intention with respect to the Trendar License's provisions at the time it was negotiated. The parties have differed in how to implement this aspect of the Trendar License. Those differences are discussed below.

10. The testimony from Mr. Adams [*11] established that processing a TCH MasterCard Fleet Card solely through the MasterCard I-Net network does not allow the TCH cardholder to receive the benefits of purchase controls and data capture that the cardholder would receive when the TCH

MasterCard Fleet Card is processed in the same fashion as a TCH proprietary card.

11. The court finds that enforcing the Trendar License in a way that requires TCH MasterCard Fleet Card transactions to be cleared directly through TCH, as opposed to the MasterCard I-Net network, at truck stops that do not currently accept the TCH proprietary card as a method of payment but do accept MasterCard as a method of payment, is consistent with the reasonable expectations of the parties at the time they entered into their Settlement Agreement and the Trendar License in May 2001.

12. In addition, such an interpretation of the Trendar License will promote competition, which is consistent with the pro-competitive goals of the Sherman Act. Allowing the TCH MasterCard Fleet Card to be processed in this fashion will expand the number of truck stops where TCH trucker fuel cards can be used by truck drivers with data capture and purchase control functionality [*12] and create a network of card acceptance that encompasses all truck stops that use the Trendar POS device, along with other truck stops such as Flying J stops, which already accept TCH cards. That will remove one of the barriers to TCH's ability to compete on a level playing field with the Comdata trucker fuel cards in transactions offering purchase controls and data capture - the current lack of widespread acceptance at U.S. truck stops that use the Trendar POS device.

B. Compliance with MasterCard Policies, Rules, or Regulations

13. Article 4.2 of the Trendar License states (emphasis added):

All TCH Card Transactions processed through the Trendar System, including without limitation TCH Cards bearing a MasterCard or Visa brand, shall be cleared directly through TCH as opposed to any third party network, such as and

without limitation the MasterCard network or Visa network, to the fullest extent permitted by the policies, rules, or regulations, as amended from time to time (including their interpretations thereof) by third party network providers. The parties will use their best reasonable efforts to obtain any consents required by the third party network providers. [*13]

14. The parties agree that the language underlined above in Article 4.2 was intended to refer, in the context of cards bearing a MasterCard logo, to MasterCard's policies, rules or regulations. The parties disagree about how the underlined language should be interpreted. The court's interpretation is discussed below in the Conclusions of Law.

15. Plaintiffs request that the court order Comdata to comply with its obligations under the Trendar License by implementing the method of processing the TCH MasterCard that is depicted in a schematic diagram referred to at the hearing as Hennessey Deposition Exhibit 5 and Hearing Exhibit B. For clarity, the court has attached a copy of that diagram "TAB Transaction Routed to Both TCH and MasterCard") to this Order.

16. Comdata complains that Plaintiffs had not provided sufficient specifications with respect to how the Trendar point-of-sale device should be programmed to allow TCH MasterCard Fleet Card transactions to be processed in accordance with the provisions of the Trendar License. But the court finds that Plaintiffs in fact did provide sufficient specifications as to how Comdata could comply with its contractual obligations, and to [*14] date more detailed specifications have not been warranted in light of Comdata's reaction to Plaintiffs' proposals, including the method suggested by Hennessey Deposition Exh. 5/Hearing Exh. B attached hereto.

17. The undisputed evidence establishes that the method of processing TCH MasterCard transactions using the Trendar device depicted on Hennessey Deposition Exhibit

5/Hearing Exh. B does not violate MasterCard policies, rules, or regulations. The MasterCard corporate representative at the Rule 30(b)(6) deposition, Joan Hennessey, confirmed this at her deposition:

> Q. Would the processing of Transportation Alliance Bank transactions Transportation Alliance Bank is the issuer bank in connection with the TCH MasterCard - would the processing of Transportation Alliance Bank transactions violate MasterCard policies, rules or regulations if the transaction were handled in the manner described in Exhibit 5?
>
> • • •
>
> A. **This would not violate our rules**, nor would our rules require this. Our rules address the MasterCard transaction which occurs in the bottom four [boxes on Exh. 5]. This arrangement is outside of the MasterCard transaction and so it would be outside of our rules. This [*15] is what our rules would address here or this would be the MasterCard transaction (indicating [bottom four boxes on Exh. 5]).
>
> • • •
>
> The MasterCard transaction is what's occurring in the bottom four squares here from the point of sale to the issuer and back. What's occurring on the top from the Trendar to the Comdata to TCH is - is not against - it **does not violate our rules** and our rules do not require that. That is a private arrangement through the Trendar Comdata TCH arrangement that would have to be addressed in those contractual arrangements and the contracts that govern those, not our rules. So, again, our rules don't require it and that is a separate contractual relationship.

Hearing Exh. H: Hennessey Deposition at p. 67 ln. 5 to 68 ln. 3 & p. 69 ln. 3-18 (January 17, 2003) (emphasis added).

18. In light of a letter from MasterCard dated August 11, 2003 (marked as Hearing Exh. E), Plaintiffs have requested that the court not rule on the alternative methods of TCH MasterCard processing that they proposed, which are depicted in Hennessey Deposition Exhibit 6 (Hearing Exh. B) and Hennessey Deposition Exhibit 7 (Hearing Exh. D). [*16] In light of that August 11, 2003 MasterCard letter (discussed below) and Plaintiffs' request, the court does not address those alternative card processing methods in this ruling.

C. *Comdata's Obligations Under the Trendar License*

19. The parties also disagree about the meaning of the verb "clear" in the following phrase in Article 4.2 of the Trendar License: "shall be cleared directly through TCH as opposed to any third party network." Relying on a definition of the word "clearing" from a MasterCard glossary (Defendant's Exh. 16), Comdata contends that the word "clear" should be limited to the function of financial settlement. Relying on dictionary definitions, Flying J contends that the word "clear" was intended to have its ordinary, broad meaning that in this context encompasses the concepts of authorization and approval, in addition to financial settlement.

20. The evidence indicates that the parties did not agree at the time they negotiated the Trendar License that the word "clear" would have only the narrow meaning that is used in the context of some banking transactions, including the MasterCard definition of "clearing" that Comdata tenders. Mr. Adams testified Plaintiffs [*17] intended the word "clear" in Article 4.2 of the Trendar License to encompass the TCH MasterCard functions of card authorization and approval (during which data capture occurs and purchase controls are applied), and financial settlement. Adams Decl. P 30. Comdata did not offer evidence establishing that the parties agreed to use a narrow definition of the verb "clear" that only encompasses the function of financial set-

tlement. The parties defined some terms in Article I of the Trendar License, but did not define the term "clear." They did not incorporate any definitions from a MasterCard glossary, and instead referred in Article 4.2 to "third-party network providers" including both VISA and MasterCard.

D. Comdata's "Impracticability" Argument

21. Relying on Article 3.1 of the Trendar License, Comdata has contended that implementation of the TCH MasterCard card processing method depicted on Hennessey Deposition Exh. 5/Hearing Exh. B is not feasible or commercially impracticable. The court's interpretation of Article 3.1's provisions is addressed in Paragraph 12 of the Conclusions of Law below.

22. The only evidence Comdata offered at the hearing in support of this argument [*18] is Paragraph 40 of Sharlean Graybill's Declaration, which states: "Comdata has advised TCH that, as a technical matter, the Trendar system is not constructed to support such a split transaction, and that the Trendar system could not be configured or programmed to do so within its current architecture and still preserve Trendar's method for processing transactions." See also Graybill Decl. at P 39 (describing the necessary changes as a "major modification" to the Trendar system).

23. Ms. Graybill's testimony merely indicated that Comdata has "advised" TCH in the past of its contentions concerning the Trendar system. Ms. Graybill does not testify herself that such processing is in fact not feasible or commercially practicable and she provides no explanation of the factual basis for Comdata's past statements. There is nothing in the Trendar License that excuses Comdata from making, if necessary, what it calls "major modifications" or changes in architecture that do not "preserve Trendar's method for processing transactions," when making the initial changes Comdata agreed to make under Article II of the Trendar License. Such language appears only in Article 3.1 pertaining to future

changes [*19] requested after the initial programming contemplated under the Trendar License, including the initial changes required to allow full functionality of the TCH MasterCard Fleet Card. See Conclusion of Law P 12. Indeed, such justifications for nonperformance of the initial programming under the Trendar License could be used by Comdata to escape any programming changes by labeling them "major modifications" or changes to its method for processing transactions.

24. In contrast, Plaintiffs' witnesses explained why the proposed TCH MasterCard processing method depicted in Hennessey Deposition Exh. 5/Hearing Exh. B is feasible and can be achieved.

25. TCH's General Manager Ted Jones testified about how the Trendar POS device already is carrying out both elements of that processing method for TCH cards. The processing function shown on the upper leg of the diagram, by which TCH MasterCard transactions are to be directly authorized through TCH with data capture and purchase controls, currently occurs each time a TCH proprietary card transaction is processed through the Trendar device at truck stops that accept the TCH proprietary card. The processing function shown on the lower leg of the [*20] diagram, by which the financial settlement for TCH MasterCard transactions will take place through the regular MasterCard process, currently occurs each time a TCH MasterCard transaction is routed by the Trendar device to the MasterCard I-Net network at truck stops that do not currently accept the TCH proprietary card. Mr. Jones also explained how a traditional MasterCard transaction for a fuel purchase involves two separate communications with the MasterCard I-Net network: 1) the first communication occurs when the customer swipes the card and the I-Net network confirms the card is authorized so the fuel pump can be activated before the customer pumps the fuel; and 2) the second communication then

effects financial settlement through I-Net after the customer has pumped the fuel and the final purchase price is known. Mr. Jones testified that there is no technical obstacle for Trendar to effect both the upper leg (communication with TCH) and the lower leg (communication with MasterCard's I-Net network) in a single card TCH MasterCard transaction as shown on Hennessey Deposition Exh. 5/Hearing Exh. B.

26. TCH's Manager of Information Technology, Kevin Famsworth, also testified about [*21] the feasibility of programming Trendar to carry out the proposed TCH MasterCard processing method depicted in Hennessey Deposition Exh. 5/Hearing Exh. B. He explained that based on his knowledge of the Trendar device and experience with computer programming, there are no technical obstacles to programming Trendar to carry out that processing method. Mr. Famsworth explained that Comdata had already made major modifications including to the Trendar "architecture" when it programmed Trendar to process TCH proprietary card transactions under the Trendar License, but Comdata stopped short of finishing that programming to allow full functionality for the TCH MasterCard Fleet Card.

27. In light of the testimony of Messrs. Jones and Famsworth, and the lack of detailed information provided to support Ms. Graybill's contentions, the court does not find persuasive Comdata's argument that the proposed TCH MasterCard processing method depicted in Hennessey Deposition Exh. 5/Hearing Exh. B would not be feasible or would be commercially impracticable.

E. Comdata's Argument Concerning Truck Stop Consent To Direct Processing Of Certain MasterCard Transactions Through Trendar

28. Comdata [*22] contends that implementing the proposed TCH MasterCard processing method depicted in Hennessey Deposition Exh. 5/Hearing Exh. B would "defraud" truck stops who have not agreed to accept TCH proprietary

card transactions. Comdata argues that it should not be required to implement that processing method except on Trendar devices located at truck stops that have explicitly agreed to allow TCH MasterCard transactions to be authorized directly through TCH.

29. The evidence from Plaintiffs' witnesses demonstrated that the only practical difference to a truck stop between having a TCH MasterCard processed through MasterCard's I-Net network, and having a TCH MasterCard processed in the manner shown in Hennessey Deposition Exh. 5/Hearing Exh. B is that the authorization for the card transaction will come directly from TCH to Trendar rather than be routed from TCH through the MasterCard I-Net network. TCH still must authorize the transaction, either directly or through I-Net. Comdata did not present evidence demonstrating that having the authorization come directly from TCH will have any material effect on a truck stop's operation. Having the card authorization come directly from TCH enables [*23] TCH to implement data capture and purchase control functionality. When a truck driver is required to enter data at the fuel pump card reader, or provide data to a cashier at a truck stop fuel desk, that process of entering data may add a slight amount of time to how long it takes to complete the TCH MasterCard transaction. Nevertheless, the court finds that truck stops expect to see truck drivers providing data to the trucker fuel card issuer as part of their fuel purchase transaction. For example, such data capture normally occurs with each purchase at a truck stop using a Comdata proprietary fuel card or Comdata MasterCard Fleet Card. Consequently, it does not appear that any "fraud" is being effected on a truck stop by having the TCH MasterCard enabled to provide the same data capture functionality as a Comdata proprietary fuel card or a Comdata MasterCard Fleet Card.

30. The court also rejects Comdata's argument that the TCH MasterCard processing method TCH proposes here will

enable TCH to obtain confidential information about truck stops that it otherwise would not be entitled to see or know. As part of the ordinary operation of its business, TCH is entitled to see information [*24] about the TCH card transactions in which its customers engage. That information includes such things as: the identity of the TCH customer, the name and location of the truck stop where the TCH customer purchased fuel, the date and time of the transaction and quantity of fuel that the TCH customer purchased, and the cost and quantity of other items that the TCH customer purchased with the TCH card. Comdata has not presented any evidence that TCH would obtain information about a truck stop's fuel prices different than the information a truck stop disseminates to the public through posted fuel prices and internet postings. If in the future a trucking company asks TCH to administer, through the TCH MasterCard, fuel discounts that the trucking company negotiates with a particular truck stop chain, that trucking company effectively will be giving its consent to TCH learning about such fuel discounts and that trucking company can reach any contractual arrangements with TCH that it deems necessary to protect the confidentiality of information shared. The court finds that TCH is entitled to receive certain information relayed to it by TCH customers through the Trendar POS device relating to [*25] transactions at truck stops in which TCH fuel card customers use their TCH MasterCard to pay for fuel and other goods or services.

31. In connection with Comdata's arguments about the alleged confidentiality of data concerning TCH MasterCard transactions, the court also notes that in Comdata's own agreements with truck stop merchants, Comdata contends that it - not the truck stop - owns all the data concerning Comdata fuel card transactions. See Hearing Exh. G, P 9(c) (Comdata form "Comchek Service Center Agreement").

32. Comdata also argues that truck stops should be free not to accept TCH proprietary card transactions if they do not want to accept a card issued by a company affiliated with their competitor, Flying J. Comdata, however, has not provided any evidence from truck stops themselves about their alleged right or desire not to accept TCH MasterCard card transactions processed directly through TCH.

33. The court also notes that no evidence was presented by Comdata that Plaintiffs ever have improperly used any data obtained by TCH, or that TCH ever shared any such data with Flying J.

34. Regardless, the evidence indicates that the proposed TCH MasterCard processing method [*26] reflected in Hennessey Deposition Exh. 5/Hearing Exh. B would only be implemented at truck stops that already accept MasterCard as a method of payment. Under MasterCard rules, such truck stops must "honor all" MasterCards. *See supra* P 6. For purposes of financial settlement, the TCH MasterCard will still be processed just like any other MasterCard transaction, with payment to the truck stop coming through normal MasterCard channels. Therefore, there does not appear to be any additional financial risk being placed on truck stops from the TCH MasterCard processing method Plaintiffs advocate here. Such truck stops have already agreed to accept TCH MasterCard transactions as part of their overall decision to accept MasterCard transactions generally. Comdata has not shown how such truck stops will be "defrauded" through this process.

35. Finally, although Comdata has demanded that TCH have written agreements in place with truck stops specifically authorizing the direct processing method for TCH MasterCard transactions shown in Hennessey Deposition Exh. 5/Hearing Exh. B, there is no evidence that Comdata has such written authorizations in place for its own direct proc-

essing through [*27] Trendar of Comdata MasterCard Fleet Card transactions.

36. Mr. Adams' testimony indicated that Plaintiffs sought direct processing for the TCH MasterCard through Trendar that was comparable to the direct processing of the Comdata MasterCard Fleet Card that was occurring as of May 2001. Adams Decl. PP 18, 21, 24, 30.

37. MasterCard's representative confirmed that Comdata is entitled to process Comdata MasterCard Fleet Card transactions privately, outside the MasterCard I-Net network, at major U.S. truck stops, without violating MasterCard rules based on the MasterCard exception allowing such private processing for what MasterCard calls "proprietary accounts." Hearing Exh. H: Hennessey Deposition at pp. 38 In. 22 to 41 In. 7. MasterCard's witness did not know if MasterCard must give written approval to a company that seeks to engage in private processing of transactions under MasterCard's "proprietary account program." *Id.* at p. 42 In. 16-22.

38. Michael Sheridan confirmed on cross-examination that Comdata and its merchant bank, AmSouth, did not obtain written approval from MasterCard for Comdata's arrangement for direct processing through [*28] Trendar, outside the MasterCard I-Net network, of Comdata MasterCard Fleet card transactions. MasterCard's Rule 30(b)(6) corporate representative, Joan Hennessey, was not aware of any written approval given by MasterCard to Comdata or AmSouth for such transactions. See Hearing Exh. H: Hennessey Deposition at pp. 79 In. 17 to 81 In. 2 (January 17, 2003). MasterCard refused to tender a corporate representative for deposition with more knowledge about this subject. Id.: Hennessey Deposition at pp. 58 In. 12 to 59 In. 11 (January 17, 2003). In light of the existing evidence confirming the lack of written approval by MasterCard for Comdata's existing arrangement for direct processing through Trendar of Comdata MasterCard Fleet Card, outside the MasterCard I-Net network, the

court treats as moot Plaintiffs' motion to compel the production of documents that would confirm that fact.

39. The testimony from Mr. Sheridan, both at his deposition and on cross-examination at the hearing, confirmed that Comdata does not have written agreements in place with the major U.S. truck stops that accept its card (including Pilot, Petro, and Travel Centers [*29] of America) by which Comdata explicitly informs those truck stops that it will be privately processing Comdata MasterCard Fleet Card transactions outside the MasterCard I-Net network or explicitly obtains their permission for such private processing. Instead, the truck stop merchant agreements on which Comdata relies to argue that it has contracts for private card processing in place with truck stops, are the standard form "service center" agreements by which truck stops agree to accept Comdata products including Comdata's proprietary (non-MasterCard) card, such as Hearing Exh. G. See Hearing Exh. I: Sheridan Deposition at pp. 44 In. 3 to 47 In. 7 (December 19, 2002); *see also id.* at p. 38 In. 16-21; p. 41 In. 15 to p. 44 In. 2(current agreement with TA mentions MasterCard in fee section).

CONCLUSIONS OF LAW

1. This court has subject matter jurisdiction to decide the merits of Plaintiffs' motion to enforce the settlement agreement.

a. The court had jurisdiction over the underlying lawsuit asserting federal antitrust claims and state law tort claims under 28 U.S.C. §§ 1331, 1332, [*30] and 1337.

b. The Settlement Agreement includes the following "Dispute Resolution" provision in Section 10 (p. 11):

> The Parties agree that they will bring any dispute, controversy, or claim arising from or relating to this Settlement Agreement to the U.S. District

Court for the District of Utah to be resolved. They are requesting that that Court retain jurisdiction over this case to resolve any such disputes that may arise.

c. In May 2001, the parties filed a Stipulated Motion For Dismissal of Claims with this Court. That Stipulated Motion stated: "The parties request that the Court retain jurisdiction to enforce the terms of the parties' Settlement Agreement dated May 18, 2001. *See Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375, 128 L. Ed. 2d 391, 114 S. Ct. 1673 (1994)."

d. The court entered its "Order Granting Stipulated Motion For Dismissal Of Claims" on May 18, 2001. That Order states: The Court retains jurisdiction to enforce the terms of the parties' Settlement Agreement dated May 18, 2001. *See Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375, 128 L. Ed. 2d 391, 114 S. Ct. 1673 (1994)."

e. Under the referenced, *Kokkonen* case, when a federal court specifically [*31] retains jurisdiction, as occurred here, then it has authority to enforce the provisions of the parties' settlement. *See, e.g., Gilbert v. Monsanto Co.*, 216 F.3d 695, 699-700 (8th Cir. 2000).

2. To the extent some of the issues raised by Plaintiffs' motion to enforce the settlement agreement might be covered by the arbitration provisions in Article XV of the Trendar License, the parties have waived that right of arbitration in connection with the issues presented at the August 13, 2003 hearing. Parties to an arbitration agreement may waive the right to arbitrate a dispute. *See Reid Burton Constr. Inc. v. Carpenters Dist. Council of S. Colo.*, 614 F.2d 698, 702 (10th Cir.), *cert. denied*, 449 U.S. 824, 66 L. Ed. 2d 27, 101 S. Ct. 85 (1980). At the August 13, 2003 hearing, Comdata withdrew its "Motion To Dismiss And Enjoin Further Pursuit Of This Matter In Violation Of The Applicable Arbitration Provision" (dated June 25, 2002), in which it had requested

that the court stay proceedings on Plaintiffs' motion to enforce the settlement agreement and require arbitration.

3. Under both Utah and Tennessee law, the court must construe the Trendar License [*32] in a way that harmonizes and gives effect to all of its provisions, recognizes the context of the agreement, and carries out the parties' intentions. In addition, to the extent the court sees any ambiguity in the Trendar License provisions at issue, the court considers the extrinsic evidence of the parties' intentions at the time they negotiated the Trendar License.

4. "[A] court must attempt to construe [a] contract so as to 'harmonize and give effect to all of [its] provisions." *Dixon v. Pro Image Inc.*, 1999 UT 89, 987 P.2d 48, 52 (Utah 1999) (quoting *Nielsen v. O'Reilly*, 848 P.2d 664, 665 (Utah 1993)); *see also Willard Pease Oil & Gas Co. v. Pioneer Oil & Gas Co.*, 899 P.2d 766, 770 (Utah 1995) (every contract provision should be considered in relation to all of the others). "In interpreting a contract, the intentions of the parties are controlling." *Winegar v. Froerer Corp.*, 813 P.2d 104, 108 (Utah 1991); *see also WebBank v. American Gen. Annuity Serv. Corp.*, 2002 UT 88, 54 P.3d 1139, 1144 (Utah 2002). The parties' intentions are determined from the plain meaning of the language of a written [*33] contract, provided that the language is not ambiguous. *See Dixon*, 987 P.2d at 52; *see also WebBank*, 54 P.3d at 1145; Winegar, 813 P.2d at 108. Contract language is ambiguous when it is "capable of more than one reasonable interpretation because of 'uncertain meanings of terms, missing terms, or other facial deficiencies." *Winegar*, 813 P.2d at 108 (quoting *Faulkner v. Farnsworth*, 665 P.2d 1292, 1293 (Utah 1983)). When contact language is ambiguous, a court considers extrinsic evidence to ascertain the parties' intentions. *See WebBank*, 54 P.3d at 1145, 1147 (holding that even though contract language was unambiguous, ambiguity existed as to nature of the transaction as a whole, such that extrinsic evidence was necessary to

determine the parties' intentions); *see also Dixon*, 987 P.2d at 52; *Willard Pease*, 899 P.2d at 770.

5. Tennessee law is consistent with these basic precepts of Utah law. *See, e.g., Nichols v. Transcor America, Inc.*, 2002 Tenn. App. LEXIS 449, at 24 (Tenn. App. 2002) (court construes unambiguous contract language; jury [*34] construes ambiguous contract language based on parol evidence); *In re Estate of Espey*, 729 S.W.2d 99, 101 (Tenn. App. 1986) ("The cardinal rule for interpretation of contracts is to ascertain the intention of the parties and give effect to the intention consistent with legal principles ... In ascertaining the intention of the parties and what was within their contemplation, the Court should consider all of the surrounding circumstances.").

6. As noted above, the parties disagree about two aspects of the language of Article 4.2 of the Trendar License: the meaning of the word "clear," and the intended effect of the reference to MasterCard policies, rules or regulations. Courts construe contract language in a way that gives effect to the ordinary meaning of words unless the evidence indicates the parties intended to adopt a special meaning. Courts also construe contract terms in light of the entire contract and in a way that effectuates the purpose of the contract.

7. Because of the lack of evidence specifically demonstrating the parties intended to use the narrow meaning of the verb "clear" in Article 4.2, the court believes the parties intended a broader meaning [*35] for "clear" that encompasses its ordinary meanings in English usage, which are set forth in the Merriam-Webster online dictionary definitions that Plaintiffs cited at p. 20 of their April 7, 2003 brief and discussed at the hearing. That definition can be found on the internet at: http://www.m-w-com/cgi-bin/dictionary. Comdata also attached a copy of it as Exhibit B to its April 24, 2003 Reply Memorandum. These meanings include the functions of authorizing and approving, in addition to financial settlement.

Therefore, the court interprets the phrase in Article 4.2 of "shall be cleared directly through TCH as opposed to any third party network" as meaning that the Trendar License calls for authorization, approval, and financial settlement of the TCH MasterCard to occur directly through TCH as opposed to the MasterCard I-Net network, subject to the court's conclusion in Paragraph 8 below concerning the effect of MasterCard regulations.

8. Comdata argues that it should not be required to implement the method of TCH MasterCard processing shown in Hennessey Deposition Exh. 5/Hearing Exh. B because the Trendar License requires all aspects of processing the TCH card transaction to go [*36] "directly through TCH as opposed to any third party network." This argument fails to take account of the additional limiting clause in Article 4.2: "to the fullest extent permitted by the policies, rules, or regulations, as amended from time to time (including their interpretations thereof) by third party network providers." The court construes this clause as limiting processing "directly through TCH" to procedures or processes that are also permitted by MasterCard rules. *Cf.* Sheridan Decl. P 6 ("Comdata and I understood that the plaintiff's goal in litigation and settlement was to have the TCH card accepted over the Trendar system and cleared directly through TCH, if permitted by MasterCard."); id. P 21 ("Comdata has repeatedly offered to have Trendar clear transactions directly through TCH so long as TCH secured MasterCard's approval and the consent of the merchant."); Graybill Decl. P 31 ("Comdata has repeatedly advised TCH that it would be willing to configure the Trendar system to route TCH MasterCard transactions directly through TCH, so long as TCH secured the consent of MasterCard and the merchant.").

9. Here, through its August 11, 2003 letter (Hearing Exh. E), MasterCard [*37] has, at least for the time being, indicated that the other two proposed methods of TCH Master-

Card processing TCH devised would violate MasterCard's proprietary transaction rules. Comdata has not offered any alternative for TCH MasterCard processing "directly through TCH" different than TCH's proposal shown in Hennessey Deposition Exh. 5/Hearing Exh. B.

10. Therefore, the court finds that the processing method for the TCH MasterCard depicted in Hennessey Deposition Exh. 5/Hearing Exh. B complies with Article 4.2 of the Trendar License as a method of processing "directly through TCH" to "the fullest extent permitted by the policies, rules, or regulations" of MasterCard. The court rejects Comdata's argument that it is not obligated under the Trendar License to implement that processing method, having been requested to do so by Plaintiffs. That argument reflects an unreasonable interpretation of the agreement's language that is inconsistent with the parties' intentions for the Trendar License.

11. For the reasons explained in the findings of fact above, there is no credible evidence that the proposed method for processing TCH MasterCard transactions will "defraud" truck stops. Therefore, [*38] the court need not address whether there is some legal basis that would excuse Comdata from carrying out is obligations under the Trendar License based on its contention that compliance would effect some sort of "fraud" or "deception."

12. With respect to Comdata's arguments of commercial impracticability and infeasibility, the court notes that Article 3.1 of the Trendar License is part of Article III, which covers "Future Changes or Modifications Initiated by TCH," and by its terms covers changes or modifications that TCH may request "following a distribution and release contemplated by Section 2.1(c) hereof." Article 2.1(c) concerns the release of software changes following Comdata's "completion of the development work for the TCH Card." Article 2.1(a) confirms that such initial development work will involve "certain software, interface and other appropriate development and

testing work [that] will be necessary to be undertaken and satisfactorily completed in order to enable the TCH Card to be used properly in the Trendar System." The definition in Article I of TCH Card includes TCH MasterCards. Therefore, the court finds as a matter of contract interpretation, that the limitations [*39] in Article 3.1 concerning changes or modifications that are "not feasible or commercially impracticable with respect to the Trendar System as it then exists," were not intended to apply to Comdata's programming work necessary to have the TCH MasterCard processed over the Trendar POS device, with transactions cleared directly through TCH to the maximum extent permitted by MasterCard rules. Consequently, the Trendar License does not excuse Comdata from making software changes to Trendar at this stage, even if Comdata deems such changes to be "commercially impracticable" or "not feasible."

13. In addition, for the reasons explained in the findings of fact above, there is no credible evidence that compliance with the proposed method for processing TCH MasterCard transactions shown in Hennessey Deposition Exh. 5/Hearing Exh. B will not be feasible or will be commercially impracticable.

14. Furthermore, neither Utah nor Tennessee law excuses Comdata from performing its contractual obligations under the Trendar License on the basis of impossibility or commercial impracticability.

15. Under Utah law, a party's seeking to be excused from performance of its contractual obligations on the [*40] ground of impossibility or commercial impracticability must demonstrate that performance can only be completed at an excessive or unreasonable cost. *See Commercial Union Assocs. v. Clayton*, 863 P.2d 29, 39 (Utah Ct. App. 1993). This requires proof that an unforeseen event occurred after the formation of the contract making performance of the obligations impossible or highly impracticable. *See id.* at 38-39.

16. Under Tennessee law, "where a person by his contract or agreement charges himself with an obligation possible to be performed, he must perform it, and he will not be excused therefrom because of unforeseen difficulties, unusual or unexpected expense, or because it is unprofitable or impracticable." *Clinchfield Stone Co. v. Stone*, 36 Tenn. App. 252, 254 S.W.2d 8, 14 (Tenn. Ct. App. 1952) (cited in *Gardner v. Gilreath*, No. CIV.A. 174, 1990 WL 130894, at *6 (Tenn. Ct. App. 1990)). To successfully assert a defense of commercial impracticability, "the party must show that the unforeseeable event upon which excuse is predicated is due to factors beyond the party's control." *Roth Steel Prods. v. Sharon Steel Corp.*, 705 F.2d 134, 149-50 (6th Cir. 1983). [*41] Increase in the cost of production does not, without more, support a claim of commercial impracticability. *See id.* at 149 n.34.

17. Here, Comdata did not present evidence sufficient to demonstrate that it should be excused from its obligations under the Trendar License because of unforeseen, prohibitively expensive costs in complying. Indeed, Article 2.2 of the Trendar License addresses how the parties will bear the cost of additional Trendar programming. Comdata did not offer any evidence about the expected cost of additional Trendar programming necessary to implement the proposed method of TCH MasterCard processing. Therefore, Trendar's cost to comply with the Trendar License cannot be the basis for arguing commercial impracticability or infeasibility. In any event, TCH's General Manager, Ted Jones, testified that TCH will pay for any programming work that it is obligated to cover under the Trendar License.

18. Both Utah and Tennessee law recognize the duty of good faith and fair dealing in connection with an agreement like the Trendar License. *See Iadanza v. Mather*, 820 F. Supp. 1371, 1388 (D. Utah 1993); *Resource Mgmt. Co. v. Weston Ranch & Livestock Co.*, 706 P.2d 1028, 1037 (Utah

1985); [*42] *Wallace v. National Bank of Commerce*, 938 S.W.2d 684, 686 (Tenn. 1996). Here, that obligation of good faith and fair dealing effectively requires that Comdata find a feasible way to implement the purpose of the Trendar License with respect to clearing TCH MasterCard transactions directly through TCH. Excusing Comdata from devising any way for direct processing of TCH MasterCard transactions would defeat the purpose of the License.

19. In addition, Article 4.2 of the Trendar License states: "The parties will use their best reasonable efforts to obtain any consents required by the third party network providers." Comdata has not presented evidence demonstrating that it used best reasonable efforts to obtain consent from MasterCard for a reasonable method of direct processing of TCH MasterCard transactions. Instead, it appears from the correspondence attached to the Declaration of Barre Burgon that TCH has presented various proposals to MasterCard, and Comdata has opposed such proposals and tried to persuade MasterCard not to grant approval.

20. In light of the findings of fact and conclusions of law above, the court finds that Comdata has breached its obligations under [*43] Articles II, III, and IV, including Article 4.2, of the Trendar License by failing promptly to implement a method for direct processing of TCH MasterCard transactions directly through TCH that is acceptable to TCH and does not violate MasterCard rules.

21. Therefore, the court orders Comdata immediately to cooperate with Plaintiffs and take all steps necessary to implement the method of TCH MasterCard processing shown in Hennessey Deposition Exh. 5/Hearing Exh. B at all Trendar locations. The parties shall submit a joint report to the court within 120 days of the date of this Order providing details about how and when Comdata has implemented that method. Thereafter, Plaintiffs will notify the court when Comdata has

fully implemented that method of TCH MasterCard processing at all Trendar locations.

22. The court expects that the parties will be able promptly to implement this method of card processing without further intervention by the court. Nevertheless, the court retains jurisdiction to address any failure by Comdata promptly to comply with the mandate in this Order.

23. The court notes that Plaintiffs contend that they have suffered damages as a result of Comdata's breach of [*44] the Trendar License. *See, e.g.*, Adams Decl. P 41. Until Comdata implements the TCH MasterCard processing method called for in this Order, it is premature to assess what damages Plaintiffs have suffered as a result of Comdata's breach of the Trendar License. Such a damages claim is not ripe yet. In addition, the court finds that any claim by Plaintiff for damages claim should be adjudicated in the context of a separate lawsuit or arbitration proceeding, with traditional rights of advance notice of claims and defenses, discovery, and a trial, if necessary. Therefore, without prejudice to Plaintiffs seeking damages for Comdata's breach of the Trendar License in some other court or arbitral proceeding, the court declines to address in this post-settlement context any such damages claim by Plaintiffs.

24. Section 12 of the May 2001 Settlement Agreement provides that the prevailing party in a dispute concerning that Agreement is entitled to recover its reasonable attorneys' fees "including the cost of any court enforcement, if necessary." Therefore, the court directs Plaintiffs to file a motion for attorney's fees under Fed. R. Civ. P. 54(d) and [*45] DUCivR 54-2, within twenty days of entry of this Order, detailing their reasonable attorneys' fees and costs associated with the proceedings since May 2002 concerning enforcement of the Settlement Agreement and Trendar License.

II. COMDATA'S MOTION TO ENFORCE PROTECTIVE ORDER

Comdata argues that the Settlement Agreement requires the parties to destroy all Confidential Materials within 45 days after the settlement. Comdata asserts that it has complied with this agreement but that Plaintiffs have not. Comdata seeks an order requiring Plaintiffs to destroy all Confidential Materials.

Plaintiffs contend that Comdata's counsel, John Chambers, and Flying J's counsel, Gregory Kerwin, reached an oral agreement on approximately June 12, 2001 and during subsequent phone calls, in which they agreed that both sides would continue to hold copies of some Confidential Materials while the Settlement Agreement was being implemented and that both parties would continue to adhere to the confidentiality obligations imposed by the Protective Order. Mr. Chambers has disputed that such an agreement was ever made.

Given the ongoing attempts to enforce the Settlement Agreement, together with [*46] the protection afforded by the confidentiality obligations imposed by the Protective Order, which remains in effect, the court declines to require Plaintiffs to destroy all Confidential Materials at this juncture. If Comdata has destroyed Confidential Materials that it now believes are necessary to obtain, it may request from Plaintiffs copies of any such Confidential Materials, and Plaintiffs shall promptly make such documents available for copying. The cost of all copying shall be divided equally between Flying J Plaintiffs and Comdata.

CONCLUSION

For the foregoing reasons and good cause appearing, IT IS HEREBY ORDERED that:

(1) Comdata's Motion to Dismiss and Enjoin Further Pursuit of This Matter in Violation of the Applicable Arbitra-

tion Provision [docket # 578] was WITHDRAWN by Comdata at the hearing on August 13, 2003;

(2) Plaintiffs' Motion to Enforce Settlement Agreement [docket # 573] is GRANTED;

(3) Comdata's Motion for Summary Judgment, or, in the Alternative, Summary Denial of Plaintiffs' Motion to Enforce [docket # 603] is DENIED;

(4) Flying J's Motion to Compel Documents [docket # 620] is MOOT; and.

(4) [sic] Comdata's Motion to Enforce Protective Order [*47] [docket # 601] is DENIED.

DATED this 25th day of September, 2003.

BY THE COURT:

_____s/_____

DALE A. KIMBALL
United States District Judge

APPENDIX C: August 3, 2005 Order Of The United States Court Of Appeals For The Tenth Circuit Denying Rehearing and Rehearing *En Banc*

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

FLYING J INC., a Utah corporation; CFJ PROPERTIES, a Utah partnership; TON SERVICES, a Utah corporation; TFJ, a Utah partnership; NCR; TCH, a Utah corporation,

Plaintiffs-Appellees,

v.

COMDATA NETWORK, INC., a Maryland corporation,

Defendant-Appellant.

No. 03-4262

ORDER

Filed August 3, 2005

Before McCONNELL, and McKAY, Circuit Judges, and FRIOT*, District Judge

* The Honorable Stephen P. Friot, of the United States District Court for the Western District of Oklahoma, sitting by designation.

Appellees' petition for rehearing is denied. Judge McKay voted to grant rehearing.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, hat petition is also denied.

Entered for the Court

PATRICK FISHER, Clerk of the Court

by: _____s/_____
Deputy Clerk

APPENDIX D: April 13, 2005 Judgment Of The United States Court Of Appeals For The Tenth Circuit

FILED
United States Court of Appeals
Tenth Circuit
APR 13 2005
PATRICK FISHER
Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

FLYING J INC., a Utah corporation; CFJ PROPERTIES, a Utah partnership; TON SERVICES, a Utah corporation; TFJ, a Utah partnership; NCR; TCH, a Utah corporation,

Plaintiffs-Appellees,

v.

COMDATA NETWORK, INC., a Maryland corporation,

Defendant-Appellant.

No. 03-4262

JUDGMENT

Filed April 13, 2005

Before McCONNELL, and McKAY, Circuit Judges, and FRIOT, District Judge*

* The Honorable Stephen P. Friot, of the United States District Court for the Western District of Oklahoma, sitting by designation.

This case originated in the District of Utah and was argued by counsel.

The judgment of that court is reversed. The case is remanded to the United States District Court for the District of Utah for further proceedings in accordance with the opinion of this court.

Entered for the Court

PATRICK FISHER, Clerk

by: _____s/_____
Deputy Clerk

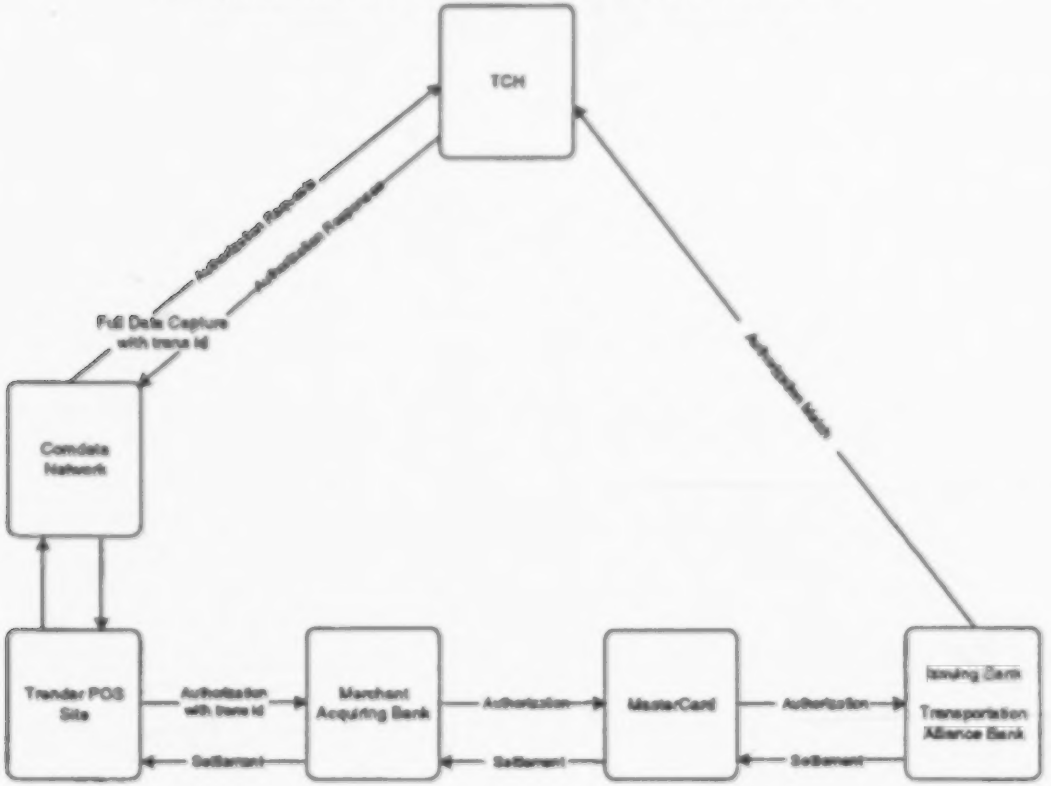
APPENDIX E: Fed. R. Civ. P. 52.

Rule 52. Findings by the Court; Judgment on Partial Findings

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

(b) Amendment. On a party's motion filed no later than 10 days after entry of judgment, the court may amend its findings--or make additional findings--and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59. When findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the findings may be later questioned whether or not in the district court the party raising the question objected to the findings, moved to amend them, or moved for partial findings.

ATTACHMENT: DIAGRAM TITLED:
"TAB TRANSACTION ROUTED TO BOTH TCH AND MASTERCARD"



(c) Judgment on Partial Findings. If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

APPENDIX F: Settlement Agreement and Release (dated May 21, 2001) without exhibits, together with Trendar License (dated May 21, 2001) and Exhibit 1 to that License: Decision and Order for *In re Ceridian Corp.*, FTC Docket No. C-3933 (April 5, 2000).

Settlement Agreement and Release (dated May 21, 2001) without exhibits

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement is entered between:

(a) FLYING J INC. ("FLYING J"), a Utah corporation;

(b) TCH LLC, a Utah limited liability company, and TCH Inc., a dissolved Utah corporation (collectively referred to here as "TCH");

(c) CFJ PROPERTIES ("CFJ"), a Utah partnership (and its partners, BWOC Inc., Douglas Oil Company of California, and Kayo Oil Co. solely for purposes of releasing CFJ Properties' claims in Paragraph 5 and not for any other purpose);

(d) TON SERVICES, INC. ("TON SERVICES"), a Utah corporation;

(e) TFJ, a Utah partnership (and its partners Pacific Sunstone, Inc. and Flying J Inc., solely for purposes of releasing TFJ's claims in Paragraph 5 and not for any other purpose);

(f) NCR CORPORATION ("NCR"), a Maryland corporation;

(g) COMDATA NETWORK, INC. ("COMDATA"), a Maryland corporation, for itself and in its capacity, without

limitation, as successor by merger to (i) TIC FINANCIAL SYSTEMS, INC., formerly a Tennessee corporation, (ii) TRENDAR CORPORATION, formerly a Tennessee corporation, (iii) SAUNDERS, INC., formerly a Delaware corporation, and (iv) CASH CONTROL CORPORATION, formerly a South Carolina corporation and wholly-owned subsidiary of SAUNDERS, INC.;

(h) TRENDAR CORPORATION ("TRENDAR"), previously a Tennessee corporation, which has been merged into COMDATA;

(i) CERIDIAN CORPORATION ("CERIDIAN"), formerly known as New Ceridian Corporation, a Delaware corporation; and

(j) ARBITRON INC., formerly known as Ceridian Corporation, a Delaware corporation.

The term "Party" in this Settlement Agreement refers to any of the following entities: FLYING J, TCH, CFJ, TON SERVICES, TFJ, NCR, COMDATA, TRENDAR, ARBITRON, and CERIDIAN. The term "Parties" refers to all of these entities.

This Settlement Agreement is binding upon the Parties as of the date of execution by the last of the Parties as shown on the signature pages hereto and is effective as of the date of entry of the Orders of Dismissal as described in Paragraph 3 below (the "Effective Date").

RECITALS

A. WHEREAS, certain disputes have arisen between FLYING J, TCH, CFJ, TON SERVICES, TFJ, and NCR on the one hand, and COMDATA, TRENDAR, CERIDIAN, and ARBITRON, on the other hand, including but not limited to antitrust, contractual, and tort claims arising out of events occurring prior to the Effective Date; and

B. WHEREAS, as a result of these disputes, FLYING J, TCH, CFJ, TON SERVICES, TFJ and NCR filed a complaint and several amended complaints in the United States District Court for the District of Utah in a case that is now captioned *FLYING J INC., a Utah corporation, TCH LLC, a Utah limited liability company, CFJ PROPERTIES, a Utah partnership, TON SERVICES, INC., a Utah corporation, TFJ, a Utah partnership, and NCR CORPORATION, a Maryland corporation, Plaintiffs, v. COMDATA NETWORK, INC., a Maryland corporation, TRENDAR CORPORATION, a Tennessee corporation, and DOES 1 THROUGH 10, Defendants*, No. 1:96CV 0066K (hereinafter the "Utah Lawsuit"); and

C. WHEREAS, FLYING J, TCH, CFJ, TON SERVICES and TFJ also filed a complaint in the United States District Court for the District of Utah with respect to the related disputes between FLYING J and CERIDIAN, captioned *FLYING J INC., a Utah corporation, TCH LLC, a Utah limited liability company, CFJ PROPERTIES, a Utah partnership, TON SERVICES, INC., a Utah Corporation, and TFJ, a Utah Partnership, Plaintiffs, v. CERIDIAN CORPORATION, a Delaware corporation, Defendant*, 1:00CV 00135K (hereinafter the "Ceridian Lawsuit"); and

D. WHEREAS, NCR moved to intervene as a plaintiff in the Ceridian Lawsuit by Motion to Intervene dated February 15, 2001; and

E. WHEREAS, without admitting any wrongdoing or liability and to avoid the expense of further litigation, the Parties to this Settlement Agreement desire to settle the Utah Lawsuit and the Ceridian Lawsuit in their entirety, including all claims, whether known or unknown, that have been asserted or could have been asserted therein against any person or entity, by dismissing the Utah Lawsuit and the Ceridian Lawsuit, and in addition by executing the mutual releases set forth in this Settlement Agreement; and

F. WHEREAS, each of the Parties to this Settlement Agreement has received all approvals necessary to enter into this Settlement Agreement, including the advice of counsel as described in Paragraph 6, and has authorized the person signing the same on its behalf to commit such Party to each and all of the terms and conditions hereof.

AGREEMENT AND RELEASE

In consideration of the payment and mutual covenants and promises contained herein, it is hereby agreed by and among the Parties to this Settlement Agreement as follows:

1. Recitals. The preceding Recitals are incorporated herein by reference and made a part of this Settlement Agreement.

2. No Admission of Liability. This Settlement Agreement is entered into to avoid the expense and inconvenience of further litigation. The execution hereof by any Party shall not constitute or be construed as: a) an admission by such Party as to the correctness of any position asserted by any other Party in the Utah Lawsuit or the Ceridian Lawsuit, or b) an admission by such Party of any liability or wrongdoing.

3. Dismissal of Utah Lawsuit and Ceridian Lawsuit.

Immediately upon execution by all Parties of this Settlement Agreement and the License Agreements referenced in Paragraph 17 below:

a. the Parties will cause their attorneys to effect a full and complete dismissal with prejudice of the Utah Lawsuit as to all causes of action that have been or could have been asserted therein. This will be accomplished by executing and filing the Stipulated Motion for Dismissal of Claims, attached hereto as Exhibit A; and

b. the Parties will cause their attorneys to effect a full and complete dismissal with prejudice of the Ceridian Lawsuit as to all causes of action that have been or could have

been asserted therein. This will be accomplished by executing and filing the Stipulated Motion for Dismissal of Claims, attached hereto as Exhibit B.

4. **Payment of Settlement Amount**. Immediately upon (a) execution of this Settlement Agreement by all Parties and (b) entry of the dismissal orders by the Court as provided in Paragraph 3, COMDATA will arrange to have the sum of US$49,000,000 (Forty-Nine Million US Dollars) (the "Settlement Amount") sent by wire transfer to the following bank account, using the following wire transfer instructions:

Wells Fargo Bank
Salt Lake City, Utah
Bank Contact: Chris Robinson
Phone No: 801-246-5163

Account Name: Flying J Operating
Account ABA: [*REDACTED*]
Account Number: [*REDACTED*]

COMDATA will be responsible for paying any wire transfer fees. The Parties acknowledge and agree that the sole obligation of COMDATA, CERIDIAN, TRENDAR, or ARBITRON with respect to the transmission of the Settlement Amount shall be to effect the wire transfer as described above to the account designated above in this Paragraph 4. The owner of the bank account designated above in this Paragraph 4 shall thereafter be responsible for causing the payment and distribution of monies in such amounts as may be determined among FLYING J, TCH, CFJ (including its partners), TON SERVICES, TFJ (including its partners), and NCR. Neither COMDATA, CERIDIAN, TRENDAR, nor ARBITRON will have any obligations or liabilities to any person or entity, including any Party, relating in any way to the distribution, transfer or payment of the Settlement Amount out of the bank account designated above in this

Paragraph 4 to specific recipients of such monies as may be agreed upon among FLYING J, TCH, CFJ (including its partners), TON SERVICES, TFJ (including its partners), and NCR.

5. Mutual Releases.

5.1. Release of COMDATA, TRENDAR, CERIDIAN, and ARBITRON by FLYING J, TCH, CFJ, TON SERVICES, and TFJ.

a. Subject to the provisions of this Settlement Agreement, FLYING J, TCH, CFJ, TON SERVICES, and TFJ, on behalf of themselves and each of their affiliates, hereby forever release, discharge and acquit COMDATA, TRENDAR, CERIDIAN, and ARBITRON, and each of them, together (as applicable) with each of their successors, assigns, parent corporations, subsidiaries, affiliates, partners, and joint venturers, and each of its or their respective present or former officers, directors, employees, agents, servants, shareholders, attorneys, experts, consultants, insurers, and representatives from any and all rights, claims, obligations, liabilities, causes of action, costs, damages, losses, expenses, compensation, and demands of every kind and nature, whether known or unknown, that are based in whole or in part on any conduct occurring on or before the Effective Date (except for the excluded matters in Paragraph 5.1(b), below) including but not limited to conduct that relates in any way to:

i. all claims that have been asserted or could have been asserted in any respect whatsoever in the Utah Lawsuit or the Ceridian Lawsuit;

ii. all claims for reimbursement of litigation expenses or attorney's fees for or relating to the Utah Lawsuit or the Ceridian Lawsuit, including without limitation claims for duplicating expenses, database costs, and any other costs or discovery expenses;

iii. any subrogated or derivative claims relating to the Utah Lawsuit or the Ceridian Lawsuit;

iv. any claims for indemnification relating to the Utah Lawsuit or the Ceridian Lawsuit; and

v. any and all claims arising out of the relationship between FLYING J, TCH, CFJ, TON SERVICES, and TFJ, on the one hand, and COMDATA, TRENDAR, CERIDIAN and ARBITRON, on the other hand through the Effective Date.

b. The release in this Paragraph 5.1 is intended by the Parties to be as broad and all encompassing as the law allows, but it shall not be deemed to cover the following claims, which are specifically excluded from this release and are not intended to be affected by this Settlement Agreement:

i. claims relating to COMDATA's routine processing of Comdata fuel card transactions over the ROSS system at non-Flying J owned facilities; and

ii. the matters described in Paragraph 5.4.

5.2. Release of COMDATA, TRENDAR, CERIDIAN, and ARBITRON by NCR.

a. Subject to the provisions of this Settlement Agreement, NCR, on behalf of itself and each of its affiliates, hereby forever releases, discharges and acquits COMDATA, TRENDAR, CERIDIAN, and ARBITRON, and each of them, together (as applicable) with each of their successors, assigns, parent corporations, subsidiaries, affiliates, partners, and joint venturers, and each of its or their respective present or former officers, directors, employees, agents, servants, shareholders, attorneys, experts, consultants, insurers, and representatives from any and all rights, claims, obligations, liabilities, causes of action, costs, damages, losses, expenses, compensation, and demands of every kind and nature, whether known or unknown, that are based in whole or in

part on any conduct occurring on or before the Effective Date (except for the excluded matters in Paragraph 5.2(b), below) including but not limited to conduct that relates in any way to:

i. all claims that have been asserted or could have been asserted in any respect whatsoever in the Utah Lawsuit or the Ceridian Lawsuit;

ii. all claims for reimbursement of litigation expenses or attorney's fees for or relating to the Utah Lawsuit or the Ceridian Lawsuit, including without limitation claims for duplicating expenses, database costs, and any other costs or discovery expenses;

iii. any subrogated or derivative claims relating to the Utah Lawsuit or the Ceridian Lawsuit;

iv. any claims for indemnification relating to the Utah Lawsuit or the Ceridian Lawsuit; and

v. any and all claims arising out of the relationship between NCR, on the one hand, and COMDATA, TRENDAR, CERIDIAN, and ARBITRON on the other hand through the Effective Date.

b. The release in this Paragraph 5.2 is intended by the Parties to be as broad and all encompassing as the law allows, but it shall not be deemed to cover the following claims, which are specifically excluded from this release and are not intended to be affected by this Settlement Agreement:

i. claims concerning warranty agreements, service agreements, and other ordinary business agreements between NCR on the one hand and COMDATA, ARBITRON, or CERIDIAN on the other hand.

5.3. Release of FLYING J, TCH, CFJ, TON SERVICES, TFJ and NCR by COMDATA, TRENDAR, ARBITRON, and CERIDIAN.

a. Subject to the provisions of this Settlement Agreement, COMDATA, TRENDAR, ARBITRON, and CERIDIAN, on behalf of themselves and each of their affiliates, hereby forever release, discharge and acquit FLYING J, TCH, CFJ, TON SERVICES, TFJ, and NCR and each of them, together (as applicable) with each of their successors, assigns, parent corporations, subsidiaries, affiliates, partners, and joint venturers, and each of its or their respective present or former officers, directors, employees, agents, servants, shareholders, attorneys, experts, consultants, insurers, and representatives from any and all rights, claims, obligations, liabilities, causes of action, costs, damages, losses, expenses, compensation, and demands of every kind and nature, whether known or unknown, that are based in whole or in part on any conduct occurring on or before the Effective Date (except for the excluded matters in Paragraph 5.3(b), below) including but not limited to conduct that relates in any way to:

i. all claims arising out of or relating to the termination of the Flying J-Comdata Third-Party Billing Agreement in 1996, and the circumstances surrounding that termination, and all claims and counterclaims that have been asserted or could have been asserted in any respect whatsoever in the Utah Lawsuit or the Ceridian Lawsuit, including any claims for payment based on any events occurring before the Effective Date of this Settlement Agreement;

ii. all claims for reimbursement of litigation expenses or attorney's fees for or related to the Utah Lawsuit or the Ceridian Lawsuit, including without limitation claims for duplicating expenses, database costs, and any other costs or discovery expenses;

iii. any subrogated or derivative claims relating to the Utah Lawsuit or the Ceridian Lawsuit;

iv. any claims for indemnification relating to the Utah Lawsuit or the Ceridian Lawsuit; and

v. any and all claims arising out of the relationship between COMDATA, TRENDAR, CERIDIAN and ARBITRON, on the one hand, and FLYING J, TCH, CFJ, TON SERVICES, TFJ, and NCR, on the other hand through the Effective Date.

b. The release in this Paragraph 5.3 is intended by the Parties to be as broad and all encompassing as the law allows, but it shall not be deemed to cover the following claims, which are specifically excluded from this release and are not intended to be affected by this Settlement Agreement:

i. claims relating to COMDATA's routine processing of Comdata fuel card transactions over the ROSS system at non-Flying J owned facilities;

ii. claims concerning warranty agreements, service agreements, and other ordinary business agreements between NCR on the one hand and COMDATA, ARBITRON, or CERIDIAN on the other; and

iii. the matters described in Paragraph 5.4.

5.4. Conditions Relating to Release Concerning the 1996 Knoxville, Tennessee Temporary Restraining Order, the Tenth Claim for Relief in the Utah Lawsuit, and the Sixth Claim fo. Relief in the Ceridian Lawsuit.

a. In the Tenth Claim for Relief in the Utah Lawsuit and the Sixth Claim for Relief in the Ceridian Lawsuit, the Flying J Plaintiffs sought a declaratory judgment that related to certain events during 1996 that were also the subject of a complaint filed by Comdata in the United States District Court for the Eastern District of Tennessee against Flying J captioned Comdata Network, Inc. v. Flying J Inc., No. 3-96-CV-475 (the "Knoxville Litigation") in which the U.S. District Court in Knoxville issued a temporary restraining order on

April 15, 1996 ("Knoxville Temporary Restraining Order"). The Knoxville Litigation was dismissed as moot by the Court in December 1996.

b. In consideration of the agreement of FLYING J, TCH, CFJ, TON SERVICES, and TFJ in this Settlement Agreement to dismiss with prejudice their Tenth Claim for Relief in the Utah Lawsuit and their Sixth Claim for Relief in the Ceridian Lawsuit, COMDATA agrees that in any future litigation it will not assert that the Knoxville Litigation, the Knoxville Temporary Restraining Order, or the dismissal of the Tenth Claim for Relief in the Utah Lawsuit and the Sixth Claim for Relief in the Ceridian Lawsuit had any effects for purposes of the doctrine of res judicata, collateral estoppel, claim preclusion and/or issue preclusion.

c. FLYING J represents that it currently has no plans to use the fuel card numbers utilized by COMDATA (whether or not such fuel cards permit effectuation of transactions with or without approval by COMDATA) for any purpose similar to the events that preceded the Knoxville Temporary Restraining Order. The Parties expect and hope that it will not be necessary for them to litigate issues concerning whether any use can be made by third-parties of the fuel card numbers utilized by COMDATA. Nevertheless, if litigation does become necessary in the future between the Parties in which issues become relevant that were framed in that Knoxville Litigation or the Tenth Claim for Relief in the Utah Lawsuit, and the Sixth Claim for Relief in the Ceridian Lawsuit, the Parties reserve the right to make any and all of the arguments and presentations of fact utilized in the Knoxville Litigation and the Utah Lawsuit, including but not limited to:

i. the fact that COMDATA obtained the Knoxville Temporary Restraining Order;

ii. the circumstances and events surrounding the Knoxville Restraining Order;

iii. FLYING J's assertions that it received from its trucking customers requests to develop a system to protect their drivers' ability to obtain diesel fuel;

iv. COMDATA's assertions concerning its proprietary interest in the COMDATA fuel card numbers; and

v. any legal arguments made in the Utah Lawsuit in connection with the Tenth Claim for Relief, EXCEPT for assertions or arguments that the Knoxville Litigation and/or Knoxville Temporary Restraining Order bar FLYING J from proceeding by reason of the application of the doctrines of res judicata, collateral estoppel, claim preclusion and/or issue preclusion.

d. Despite the fact that the Tenth Claim for Relief in the Utah Lawsuit and the Sixth Claim for Relief in the Ceridian Lawsuit will be dismissed with prejudice under this Settlement Agreement, each of FLYING J and COMDATA agrees not to raise any objection to the other based or grounded on such dismissal offering the facts and arguments referenced in Paragraph 5.4(c).

5.5. Release of Unknown Claims.

Each Party hereby expressly agrees that it waives and releases with respect to the released claims, any and all provisions, rights and benefits conferred by any law of any state or territory of the United States, or principle of common law, which is similar, comparable or equivalent to §1542 of the California Civil Code which provides that "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor." The Parties, and each of them, on behalf of themselves their affiliates, successors and assigns, hereby expressly waive and fully, finally, and forever settle and release, upon signature of this Agreement, any

known or unknown, suspected or unsuspected, contingent or noncontigent claim (except as noted in Paragraph 5.1 to 5.4 above), whether or not concealed or hidden, without regard to the subsequent discovery or existence of such different or additional facts.

6. **Agreement Executed with the Advice of Counsel**.

a. FLYING J, TCH, CFJ, TON SERVICES, and TFJ, each represent, warrant and agree that, in executing this Settlement Agreement, it does so with full knowledge of any and all rights it may have with respect to or against COMDATA, TRENDAR, ARBITRON, or CERIDIAN and that it has received independent legal advice from its attorneys with regard to the facts involved and the controversy herein compromised, and with regard to the rights and asserted rights arising out of said facts.

b. NCR represents, warrants and agrees that, in executing this Settlement Agreement, it does so with full knowledge of any and all rights it may have with respect to or against COMDATA, TRENDAR, ARBITRON, or CERIDIAN and that it has received independent legal advice from its attorneys with regard to the facts involved and the controversy herein compromised, and with regard to the rights and asserted rights arising out of said facts.

c. COMDATA, TRENDAR, ARBITRON, and CERIDIAN each represent, warrant and agree that, in executing this Settlement Agreement, it does so with full knowledge of any and all rights it may have with respect to or against FLYING J, TCH, CFJ, TON SERVICES, TFJ, or NCR and that it has received independent legal advice from its attorneys with regard to the facts involved and the controversy herein compromised, and with regard to the rights and asserted rights arising out of said facts.

7. **Successors and Assigns**.

a. This Settlement Agreement shall be binding upon, and inure to the benefit of, the Parties hereto, including any Party which is expressly benefited or bound herein. It shall also be binding upon the Parties' agents, employees, representatives, trustees, officers, directors, shareholders, divisions, parent corporations, subsidiaries, partners, corporate affiliates, assigns, and successors-in-interest.

b. Neither this Agreement nor the Comdata License and Trendar License referenced in Paragraph 17 below, can be assigned by any Party without the consent in writing of all Parties who are a signatory to any such Agreement or License, which consent shall not be unreasonably withheld, except that any Party may assign its rights and obligations to a commonly controlled affiliate without such consent, but in the event of any such assignment the assignor shall remain fully bound and obligated as if such assignment was void ab initio unless the other Parties consent to release in writing.

c. The Parties recognize that it is critical to the performance of COMDATA's obligations under the Comdata License and the Trendar License that the same entity who is carrying out the Comdata Business (as defined in the April 5, 2000 FTC Consent Order) or the Trendar Business (as defined in the April 5, 2000 FTC Consent Order) also be obligated to carry out COMDATA's obligations under those Licenses. Therefore, any assignment, transfer, sale, sale resulting in the emergence of a successor corporation, creation of subsidiaries, or any similar change involving the Comdata Business or the Trendar Business must include provisions obligating:

i. the person or entity who will be carrying on substantially all of the Comdata Business to continue to perform COMDATA's obligations under the Comdata License; and

ii. the person or entity who will be carrying on substantially all of the Trendar Business to continue to

perform COMDATA's obligations under the Trendar License.

The Parties agree that any material breach of this Paragraph 7 would cause irreparable injury to FLYING J, TCH, CFJ, TON SERVICES, and/or TFJ for which monetary damages would be inadequate. Consequently, any of those entities may seek injunctive relief to enforce the provisions of this Paragraph, or prohibit any action in violation of this Paragraph.

8. No Assignments. Each Party to this Settlement Agreement states and represents to the other Parties that it has not entered into any agreement assigning any right to pursue, bring legal action upon, or recover on account of its claims covered by this Settlement Agreement to any person, corporation, association, or other entity. Each Party agrees to indemnify and hold harmless the other Parties from and against any loss, cost, or expense arising out of or occasioned by any such assignment.

9. Controlling Law.

a. This Agreement shall be governed by the internal law, and not the law pertaining to or applicable under conflicts or choice of laws, of the State of Utah.

b. The designation of Utah law as the governing law for this Settlement Agreement shall not be deemed an election of law to have the Utah Arbitration Act, Utah Code Ann. § 78-31a-1, et seq., govern any arbitration under the License Agreements referenced in Paragraph 17, and shall not preclude application of the Federal Arbitration Act to any arbitration under those License Agreements.

10. Dispute Resolution.

The Parties agree that they will bring any dispute, controversy, or claim arising from or relating to this Settlement Agreement to the U.S. District Court for the District of Utah

to be resolved. They are requesting that that Court retain jurisdiction over this case to resolve any such disputes that may arise.

11. **Negotiated Agreement**. This Settlement Agreement has been the subject of arm's length, good faith negotiations and discussions between and among the Parties. It has been and shall be construed to have been drafted by all the Parties to it, so that any rule of construing ambiguities against the drafter shall have no force and effect.

12. **Attorneys' Fees**. The Parties agree that if an arbitration or lawsuit becomes necessary to resolve any dispute concerning any Party's obligations or rights under this Settlement Agreement, the prevailing Party shall be entitled to recover as damages from the non-prevailing Party reasonable attorneys' fees incurred in connection with such arbitration and/or lawsuit, including the cost of any court enforcement, if necessary.

13. **Entire Agreement**. This Settlement Agreement and the attached exhibits constitute the entire understanding among the Parties relating to the subject of this settlement, and no representations, warranties, or inducements have been made to any Party concerning this Settlement Agreement other than the representations, warranties and covenants contained and memorialized in this Settlement Agreement. This Settlement Agreement may be amended or modified only by a written instrument, specifying that it amends this Settlement Agreement, signed by the Party against whom the enforcement of any waiver, change, modification, extension or discharge is sought. The waiver by one Party of any breach of this Settlement Agreement by any other Party shall not be deemed a waiver of any other prior or subsequent breach of this Settlement Agreement.

14. Confidentiality.

a. The Parties and their attorneys agree that the following terms of this Settlement Agreement are and shall remain strictly confidential:

Paragraph 4: Settlement Amount;

Paragraph 5.4: Conditions Relating to Release Concerning the 1996 Knoxville, Tennessee Temporary Restraining Order, the Tenth Claim for Relief in the Utah Lawsuit, and the Sixth Claim for Relief in the Ceridian Lawsuit;

Paragraph 19: Clarification of Intent of Comdata License Paragraph 7.1(b)

Paragraph 20: No Further Reliance on Knoxville Temporary Restraining Order and Related Events

The terms of the confidential Paragraphs listed above will not be disclosed to any third party or entity except such disclosure as may be required by appropriate federal and state securities laws or involuntarily compelled by a court of law or by the FTC, or which may be necessary in any dispute between the Parties as to interpretation or breach of this Settlement Agreement. The terms of the confidential Paragraphs listed above may be disclosed by the Parties to the extent necessary to: i) officers, directors, and appropriate employees of the Parties and their affiliates; ii) counsel for the Parties and their affiliates; iii) auditors and tax advisors for the Parties and their affiliates; and iv) financial institutions with whom Parties have or may have a financial relationship.

b. Immediately following the Effective Date, either of the Parties may issue Press Releases, the substance of which will conform to the statements attached hereto as Exhibit E. In addition, any of the Parties may disseminate copies of such Press Releases to anyone they wish. In responding to

inquiries from others in the industry and members of the public about this Settlement Agreement, the Parties will direct such inquiring persons to such Press Releases.

c. Nothing about this Paragraph 15 will limit FLYING J, TCH, and COMDATA from discussing the terms of the Comdata License and the Trendar License with any person or entity.

15. Counterpart Execution and FAX signatures. This Settlement Agreement may be executed in multiple counterparts; provided, however, that this Settlement Agreement shall not become binding on any of the Parties unless and until the same is executed by all of the Parties. The Parties agree to accept FAX signatures as binding provided that the original signatures are promptly delivered to counsel for the other Parties.

16. Agreed Protective Order. The Parties recognize that their obligations under the Court's July 27, 1998 Agreed Protective Order, as amended, survive the execution of this Settlement Agreement and the dismissal of the Utah Lawsuit.

17. Trendar and Comdata Licenses.

As a material consideration for the agreement of the Parties to settle and resolve their differences as set forth in this Settlement Agreement, COMDATA and FLYING J have entered into the COMDATA LICENSE in the form attached hereto as Exhibit C and COMDATA and TCH have entered into the TRENDAR LICENSE in the form attached hereto as Exhibit D, each of which shall become effective as of the Effective Date of this Agreement. In the event of a conflict between the provisions of this Settlement Agreement and the provisions of the COMDATA LICENSE and the TRENDAR LICENSE, the provisions of this Settlement Agreement shall control.

18. FTC Consent Order.

COMDATA, ARBITRON, and CERIDIAN agree that as of the Effective Date of this Settlement Agreement, FLYING J and TCH shall be deemed entitled to receive all the rights, privileges, and benefits afforded by the Federal Trade Commission Decision and Order dated April 5, 2000 in *In re the matter of Ceridian Corporation*, Docket No. C-3933 ("FTC April 5, 2000 Order"). In particular, COMDATA, ARBITRON, and CERIDIAN waive the right to rely on the provisions of Paragraph II.M. and Paragraph III.K. of the FTC April 5, 2000 Order as grounds for denying licenses to FLYING J, TCH, and their affiliates. FLYING J is hereby deemed both a Designated POS System Provider and an Incumbent System Provider for purposes of the FTC April 5, 2000 Order, that is eligible to receive a license to effect Transactions originated by Comdata Cards under Article II of that Order. TCH is hereby deemed an approved Fleet Card Issuer for purposes of the FTC April 5, 2000 Order, that is eligible to receive a license to the Trendar Services from Comdata under Article III of that Order. FLYING J, TCH, and their affiliates have standing to seek the assistance of the Monitor Trustee or the Federal Trade Commission in connection with trying to resolve any disputes that may arise concerning the Comdata License, the Trendar License, or the continuing obligations of COMDATA, ARBITRON, and CERIDIAN under the FTC April 5, 2000 Order.

19. Clarification of Intent of Comdata License Paragraph 7.1(b).

a. Paragraph 7.1(b) of the Comdata License asks FLYING J to acknowledge that the License does not transfer to FLYING J any right, title, or interest in the Comdata Cards or any Comdata Customer. It also provides that Comdata or its Customers "retains all right, title and interest in and to the Comdata Cards and the Transactions, including, . . . card numbers . . . ."

b. FLYING J interprets this language as meaning that Comdata or its Customers (including truck stops and trucking companies) retain whatever proprietary interest, if any, that each may have in the fuel card numbers. FLYING J clarifies here that by signing that Comdata License in the form of agreement that COMDATA prepared for the FTC April 5, 2000 Order, FLYING J does not acknowledge that COMDATA has any proprietary interest in such fuel card numbers. In addition, FLYING J views trucking companies whose drivers fuel at truck stops as customers of both the truck stop and the fuel card company, rather than solely customers of the fuel card company.

c. COMDATA contends, among other things, that the card numbers are and remain solely its property.

d. Rather than resolve these differences in this Settlement Agreement, the Parties agree to disagree about these matters. Nevertheless, COMDATA and FLYING J do agree that the fact that FLYING J and COMDATA have executed the Comdata License containing Paragraph 7.1(b) and have executed this Settlement Agreement containing this Paragraph 19 shall not act as, or be asserted by either COMDATA or FLYING J as, an admission or concession as to issues that could arise in the future between the Parties including the circumstances described in Paragraph 5.4.

20. No Further Reliance on Knoxville Temporary Restraining Order and Related Events.

COMDATA, ARBITRON, and CERIDIAN agree that they will not reference, or seek to rely on, the Knoxville Temporary Restraining Order (defined above in Paragraph 5.4) or the events leading up to it, in any judicial, administrative, or regulatory proceeding or in any other context (including sales to customers) for any purpose except in the circumstances set forth above in Paragraph 5.4(c). In particular, COMDATA, ARBITRON, and CERIDIAN agree that they will not rely on that Knoxville Temporary Restraining Order,

or the events leading up to it, as a basis for refusing to deal with FLYING J, TCH, CFJ, TON SERVICES, TFJ, or their affiliates, successors or assigns.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed on the date set forth beside their respective signatures.

Effective Date: May 21, 2001. [To be filled in following execution by all Parties and entry of the dismissal orders by the Court.]

[signature blocks by all parties and their counsel omitted from this copy]

EXHIBITS

A. Stipulated Motion for Dismissal of Claims for Utah Lawsuit.

B. Stipulated Motion for Dismissal of Claims for Ceridian Lawsuit.

C. Comdata License.

D. Trendar License.

E. Press Release

[Exhibits omitted from this copy]

Trendar License (dated May 21, 2001) and Exhibit 1 to that License: Decision and Order for *In re Ceridian Corp.*, FTC Docket No. C-3933 (April 5, 2000)

TRENDAR LICENSE
(TCH Card Access To Trendar)

THIS TRENDAR LICENSE, dated as of the 21st day of May, 2001 ("Trendar License"), is made and entered into by and between Comdata Network, Inc. d/b/a Comdata Corporation, a Maryland corporation ("Comdata"), and TCH LLC, a Utah limited liability company ("TCH").

WITNESSETH:

WHEREAS, Comdata, through its Merchant Services Division, has developed, markets, sells, deploys and maintains a proprietary point of sale system, known as the Trendar™ System, as hereinafter defined, comprised of certain hardware, software, communications networks and related components used by truck stops for (i) the authorization of certain card-based transactions, (ii) capture and compilation of information related to such transactions and (iii) certain ancillary services related thereto as may be made available from time to time in connection with such system;

WHEREAS, TCH is primarily engaged in the business of issuing TCH Cards, as hereinafter defined, to trucking companies who may have a use for such cards to effect diesel fuel purchases and other authorized transactions at truck stops, and desires to obtain a license to have its card(s) used in connection with the Trendar System, as hereinafter defined, subject to and in accordance with the terms and conditions of this Trendar License;

NOW, THEREFORE, for and in consideration of the mutual promises and covenants set forth herein, and other good and valuable consideration, the receipt and sufficiency

of which are hereby acknowledged, Comdata and TCH hereby agree as follows:

ARTICLE I
Definitions

The Parties incorporate by reference into this Trendar License the terms and conditions of the Federal Trade Commission ("FTC") Decision and Order dated April 5, 2000 in *In re matter of Ceridian Corporation*, Docket No. C-3933 ("FTC April 5, 2000 Order") (attached hereto as Exhibit 1). The terms used in this Trendar License, and not otherwise defined herein, shall have the meaning(s) ascribed to them in the FTC April 5, 2000 Order.

"Affiliate" of a specified Person shall mean any other Person directly or indirectly controlling or controlled by or under direct or indirect common control with such specified Person. For purposes of this definition, "control" when used with respect to any Person means the power to direct the management policies of such Person, directly or indirectly, whether through the ownership of voting securities, by contract or otherwise; and the terms "controlling" and "controlled" shall have meanings correlative to the foregoing.

"Business Day" shall mean any day which is not a Saturday, Sunday or legal holiday and on which banking institutions in the city of Nashville, Tennessee are open for business. Except as specifically provided to the contrary herein, if a payment or performance date under this Trendar License is not a Business Day, payment or performance, as applicable, may be made on the next succeeding Business Day and no interest, if applicable, shall accrue for the intervening period.

"Comdata" shall mean Comdata Network, Inc. d/b/a Comdata Corporation, a Maryland corporation, its successors and assigns, subsidiaries, divisions, groups and Affiliates (not including Ceridian).

"Developer" shall mean the third party Person designated and approved by Comdata, from time to time, to perform the software and other development work required to enable the Trendar System to process Transactions, as may be specifically set forth in Article II hereof. The parties hereto recognize that the Developer is not an Affiliate of Comdata.

"Disclosing Party" shall have the meaning assigned to it in Section 6.2 hereof.

"Effective Date" shall mean the date Comdata distributes and releases the TCH Card interface and other software changes as provided in Section 2.1(c).

"Party" shall mean either TCH or Comdata.

"Parties" shall mean both TCH and Comdata.

"Permitted Uses" shall mean access and use of the Trendar System by TCH and its cardholder customers to effect Transactions directed to TCH from Service Centers originated by use of the TCH Card at Service Centers.

"Proprietary Information" shall have the meaning assigned to it in Section 6.2(a) hereof.

"Recipient" shall have the meaning assigned to it in Section 6.2 hereof.

"Service Center" shall mean any truck stop, gasoline service station, fueling service center, Terminal Fueling Facility, cardlock, or unattended fueling site which has purchased, leased or otherwise properly acquired the Trendar System from Comdata for use in connection with its business at certain specified geographic locations and is current with respect to its obligations to Comdata and the Trendar System.

"TCH" shall mean TCH LLC, a Utah limited liability company, its successors and assigns, subsidiaries, divisions, and groups.

"TCH Cards" means all of TCH's current and future proprietary, private label TCH®, Frequent Fueler MoneyCard MasterCard, TCH MasterCard Fleet Card, or other Fleet Cards, however named, issued by TCH, either directly or indirectly, to Trucking Companies or truck drivers who use such cards to effect Transactions at Service Centers approved by TCH.

"Term" shall mean the term of this Trendar License determined in accordance with Article XIII hereof.

"Trendar License" shall mean this Trendar License (together with all Exhibits, Schedules, Attachments, Appendices and Addenda) as the same may be amended, modified or supplemented from time to time during the Term hereof.

"Trendar System" shall mean all current and future versions of the proprietary point of sale system developed, marketed, deployed and currently maintained by Comdata, whether called Trendar®, FUELDESQ™, MultiDESQ™, SmartFuel®, or any other name, through its Merchant Services Division, and without limitation is inclusive of all point-of-sale systems that are in the future acquired, directly or indirectly, by Comdata for the processing of Fleet Cards, comprised of certain hardware, software, communications networks and related components used by truck stops and other service center locations for (i) the authorization of certain card-based transactions or transactions effected by means of another approved payment mechanism(s), (ii) capture, compilation and transmission of information related to such transactions and (iii) certain ancillary services related thereto as may be made available from time to time in connection with such system. Certain components of the Trendar System may vary among Service Centers in respect of functionality and hardware and software components and configurations, depending on the type of point of sale device acquired by each such Service Center, including by way of example and as the same may be modified or changed from

time to time, the FUELDESQ™ system, the MultiDESQ™ system and the SmartFuel® system.

ARTICLE II
Development Related to Use of the TCH Card in the Trendar System

2.1 Method of Development.

(a) Comdata and TCH recognize and agree that certain software, interface and other appropriate development and testing work will be necessary to be undertaken and satisfactorily completed in order to enable the TCH Card to be used properly in the Trendar System. The parties further acknowledge and agree that Comdata has separately approved and contracted with the Developer to perform such development work and services in connection with the Trendar System.

(b) Comdata and TCH agree that it is the responsibility of TCH, as between the parties, to contact and work with the Developer in a diligent and timely manner to cause any necessary development and testing work to be satisfactorily completed. Without limiting the foregoing, TCH shall deliver specifications, data and such other information or assistance (including, without limitation, host availability, test telephone numbers, test magnetic cards, test accounts, protocol specifications, data formats and return messages), in such form and at such time(s) as the Developer may reasonably request, to perform such development and testing work. Failure of TCH to provide such information to the Developer or to otherwise cooperate with the Developer may result in delays with respect to the TCH Card's use in the Trendar System.

(c) Upon completion of the development work for the TCH Card and successful quality assurance testing with respect thereto, as conducted by the Developer and TCH, the Developer and TCH each must provide written notice (singu-

larly, a "Readiness Notification") to Comdata certifying that the TCH Card interface and other software changes, if any and as applicable, are ready for distribution and release through the Trendar System. TCH shall additionally include in its Readiness Notification (i) the date on which TCH desires the TCH Card interface and other software changes, if any, to be distributed and released by Comdata through the Trendar System and (ii) a detailed listing (e.g., address, contact name, etc.) of Service Centers at which TCH desires the TCH Card interface and other software changes, if any, to be distributed and released by Comdata. Comdata agrees that it shall use its best reasonable efforts to distribute and release the TCH Card interface (and other software changes, if any) in accordance with TCH's written instructions with respect to timing. Comdata shall thereafter distribute and release the TCH Card interface (and other software changes, if any) to the Trendar System devices located at those Service Centers identified by TCH in its Readiness Notification in either the next quarterly release if such programming is completed at least thirty (30) days prior to such quarterly release or within three (3) months of the date such programming is completed, whichever is less. Comdata agrees that:

(i) Should the TCH Card programming not be completed by August 30, 2001, Comdata will pay TCH a penalty fee of US $500 (Five Hundred US Dollars) per day for each day the TCH Card programming is delayed after August 30, 2001.

(ii) In addition to any penalty fees assessed in accordance with Section 2.1(c)(i), should the TCH Card testing not be completed by September 30, 2001, Comdata will pay TCH a penalty fee of US $500 (Five Hundred US Dollars) per day for each day the TCH Card testing is delayed in completion beyond September 30, 2001.

(iii) In addition to any penalty fees assessed in accordance with Sections 2.1(c)(i) and 2.1(c)(ii), should the TCH Card interface (and other software changes, if any) not be populated by January 1, 2002 to those users of the Trendar System identified by TCH, Comdata will pay TCH a penalty fee of US $500 (Five Hundred US Dollars) per day for each day the TCH Card interface is delayed in being populated to users of the Trendar System beyond January 1, 2002.

Notwithstanding the foregoing, penalties shall not be applicable to any delays attributable to acts or omissions of TCH. The Parties will use their best reasonable efforts to get this programming, testing, and software distribution work completed sooner than the dates listed in Section 2.1(c) above to the extent reasonably possible.

2.2 Scheduling, Costs and Payment for Development Work. Completion of the required development and testing work necessary with respect to the TCH Card shall be in accordance with such time schedule as the Developer and TCH shall mutually agree upon. The costs and expenses with respect to any and all work performed by the Developer with respect to the initial programming to enable TCH Cards to be processed across the Trendar System shall be the responsibility of Comdata. TCH shall be responsible for reasonable development costs and expenses relating to any future modifications and changes as contemplated by Section 3.1.

2.3 Ownership of Development Work Codes, Etc. Comdata and TCH acknowledge and agree that the development work and work products resulting therefrom are "works made for hire" by the Developer for and on behalf of Comdata for the Trendar System and that Comdata, as between the parties, shall be the exclusive owner thereof including, without limitation, the TCH Card interface, Trendar object code and Trendar source code and documentation thereof.

The specifications and any other similar data or materials for the TCH Card (such as that listed in Section 2.1(b) hereof) furnished by TCH to the Developer shall be afforded the protection set forth in Section 6.2 of this Trendar License.

ARTICLE III
Future Changes or Modifications Initiated by TCH

3.1 Changes Requiring TCH Card Interface or Other Development Work. If, during the Term hereof and following a distribution and release contemplated by Section 2.1(c) hereof, TCH desires to make any changes or modifications with respect to Transactions, the TCH Card or use thereof which would require further software programming or similar development work with respect to the Trendar System, Comdata and TCH agree that TCH shall follow the methods and procedures set forth in Article II of this Trendar License to effect any such future changes or modifications. TCH shall initiate a request for any change or modification by sending written notice, setting forth the change or modification in reasonable detail, to the Developer and Comdata. Comdata and Developer shall treat and consider such requests made by TCH in the same manner as requests made by other fuel card providers and shall not discriminate in any manner. TCH recognizes and agrees that characteristics of, and technology used in connection with the Trendar System (including, without limitation, use of certain communications and equipment alternatives by various Service Centers), may limit, restrict or prohibit the implementation of certain changes or modification to the extent not feasible or commercially impracticable with respect to the Trendar System as it then exists, which may be proposed by TCH.

3.2 Changes In Service Centers Accepting the TCH Card. If, during the Term of this Trendar License following a distribution and release contemplated by Section 2.1(c) hereof, TCH desires to add or delete one or more Ser-

vice Centers with respect to the use of the TCH Card through the Trendar System by any such Service Center, TCH shall provide written notice to Comdata of its intent to add or delete any such Service Center providing reasonable details with respect to such action (e.g., address, date of desired addition or deletion, as applicable, and contact name). Comdata agrees that it shall use its best reasonable efforts to cause any such addition or deletion to be effected in accordance with TCH's written instructions and, in any event, within thirty (30) days of the date of Comdata's receipt of any such notice provided by TCH pursuant to this Section 3.2, and TCH shall provide all assistance reasonably required to effect such additions or deletions.

ARTICLE IV
Grant of License

4.1 In accordance with the terms and conditions of this Trendar License, Comdata hereby grants to TCH, and TCH hereby accepts, a nonexclusive license solely in North America, during the Term hereof, to access and use the Trendar System solely for the Permitted Uses. TCH acknowledges and agrees that this Trendar License does not convey to TCH any right or interest in the Trendar System or any information or materials related thereto other than the limited right for Permitted Uses. TCH acknowledges and agrees that any and all uses of the Trendar System other than the Permitted Uses are strictly prohibited. Further, TCH acknowledges and agrees that this is not an exclusive license with respect to the Trendar System and that Comdata is free to continue to grant similar licenses to other Persons. All rights and licenses not expressly granted herein are reserved to Comdata. The rights and licenses granted TCH hereunder are personal, non-transferable (except as contemplated by Section 14.5 hereof), non-assignable (except as contemplated by Section 14.5 hereof), and in all cases are granted without the right to sublicense. No rights or licenses are granted with respect to

any items, products or rights of Comdata other than the Trendar System.

4.2 All TCH Card Transactions processed through the Trendar System, including without limitation TCH Cards bearing a MasterCard or Visa brand, shall be cleared directly through TCH as opposed to any third party network, such as and without limitation the MasterCard network or Visa network, to the fullest extent permitted by the policies, rules, or regulations, as amended from time to time (including their interpretations thereof) by third party network providers. The parties will use their best reasonable efforts to obtain any consents required by third party network providers.

ARTICLE V
License and Distribution Fee

[Left intentionally blank by agreement of the Parties.]

ARTICLE VI
Confidentiality, Non-Disclosure and Other Protections

6.1 The Trendar System. TCH agrees to use the Trendar System for the Permitted Uses as the same relate to TCH's business operations and for no other purpose. Accordingly:

(a)TCH agrees not to provide any Proprietary Information, as defined in Section 6.2, relating to, or access to, the Trendar System to any third party Person except as expressly contemplated by this Trendar License or otherwise agreed to by Comdata in advance in writing.

(b)No right to use, copy, or display the Trendar System, or any part or component thereof, is granted to TCH except as expressly provided in this Trendar License. TCH acknowledges that the license granted hereby to use the Trendar System does not transfer any right, title or interest in the

Trendar System to TCH. Comdata or its vendors or suppliers, as applicable, retains all right, title and interest in and to the Trendar System, including, without limitation, any and all proprietary rights, copyrights, patents, trademarks, trade dress, trade secrets and confidential rights associated therewith, whether arising under the laws of the United States of America, the laws of other jurisdictions or international conventions. TCH agrees to respect, and not to remove, obliterate, or cancel from view any copyright, trademark, or confidentiality mark, legend, or notice appearing in connection with the Trendar System or output therefrom. Further, TCH agrees not to alter, translate, reverse engineer, disassemble, decompile, or create derivative works of the Trendar System, or any part or component thereof, including, without limitation, modifying the Trendar System software and other components to permit their operation on non-compatible hardware or within other systems. TCH shall cooperate with Comdata to take whatever steps Comdata deems appropriate to protect its rights and interests in and to the Trendar System; provided, however, that Comdata shall pay and/or reimburse TCH for any reasonable costs and expenses incurred by TCH in providing such cooperation.

(c)TCH acknowledges and agrees that the Trendar System constitutes and contains valuable proprietary products and trade secrets of Comdata, embodying substantive creative efforts and confidential information, ideas and expression. Accordingly, TCH agrees to treat (and to take precautions to ensure that its employees treat) in accordance with the provisions of this Section 6.1 and Section 6.2 Proprietary Information relating to the Trendar System as confidential during the Term of this Trendar License and thereafter for so long as such confidential information and trade secrets shall be entitled to confidential treatment as provided by law.

6.2 Mutual Non-Disclosure of Confidential Information. In connection with the business relationship and

transaction existing or expected to exist between Comdata and TCH, each party hereto acknowledges and agrees that it will be necessary for the one party hereto (a "Disclosing Party") to disclose certain confidential or proprietary information to the other party hereto (the "Recipient"'). Each party hereto agrees to treat such information in accordance with the terms of this Section 6.2.

(a)"Proprietary Information" shall mean, for purposes of this Section 6.2, any and all information in whatever form disclosed by a Disclosing Party to the Recipient relating to the business of the Disclosing Party, including, by way of example and not in limitation: customer information; TCH Card specifications provided by TCH; Trendar System specifications, design, software and information; TCH Card Transaction information; and other information which may be designated as such by the Disclosing Party. Without limiting the foregoing, Proprietary Information of Comdata shall also include all information disclosed by the Developer to TCH. Proprietary Information shall not, however, include information which (i) is or becomes generally available to the public through no act, error or omission of the Recipient, (ii) is or becomes available to the Recipient on a non-confidential basis from a source other than the Disclosing Party or its representatives, provided that such source of such information is not otherwise under any obligation of confidentiality in respect thereof, (iii) is within the possession of the Recipient prior to it being furnished to the Recipient by the Disclosing Party; or (iv) is independently developed by the Recipient without reference to Proprietary Information of the Disclosing Party.

(b)The Proprietary Information will be kept confidential and will not, without the prior written consent of the Disclosing Party, be used by the Recipient, its employees or representatives or disclosed by the Recipient, its employees or representatives to any other third party Person, except as other-

wise expressly provided in this Section 6.2. The Recipient will transmit the Proprietary Information only to those employees or representatives who need to know the Proprietary Information for the purpose of performing work in connection with the business relationship contemplated by this Trendar License and who are informed of the confidential nature of the Proprietary Information, and who agree to be bound by the provisions of this Section 6.2.

(c) Except for the express purpose of effecting the performance contemplated by this Trendar License, the Proprietary Information shall not be (i) reproduced without the prior written consent of the Disclosing Party; (ii) reverse engineered, decompiled or subjected to similar procedures or processes; or (iii) disclosed to third parties without the prior written consent of the Disclosing Party, unless such disclosure is mandated by law, rule or regulation binding upon the Recipient. In the event that the Recipient is requested or required by legal process or by operation of applicable law to disclose the Proprietary Information, it will provide to the Disclosing Party prompt notice of such request so that the Disclosing Party may seek an appropriate protective order and/or waive compliance by and with the provisions of this Section 6.2.

(d) Proprietary Information of the Disclosing Party shall be used by the Recipient solely for the acceptance and processing of TCH Card Transactions through the Trendar System.

(e) Each party hereto agrees that every file, document, computer disk, notation, record, diary, memorandum or other repository containing Proprietary Information is and shall be the sole and exclusive property of the Disclosing Party. The Recipient shall deliver the same (and any copy, abstract, summary or reproductions thereof) to the Disclosing Party whenever the Disclosing Party requests, and in any event, prior to or at the termination of this Trendar License.

(f) Each party hereto further acknowledges and agrees, for purposes of the nondisclosure requirements of the Trendar License only and not for any other purpose, that (i) the markets for their respective products and services are unlimited geographically and the above nondisclosure requirements apply on a worldwide basis; (ii) the geographical and durational limitations imposed with respect to the Proprietary Information are fair and reasonable, and are necessary to protect the legitimate interests of the parties; and (iii) in the event that any provision relating to the geographic, durational or other restrictions set forth in this Section 6.2 are declared by a court of competent jurisdiction to exceed the maximum time period, area or other measure such court deems reasonable and enforceable, said time period, area or other measure shall be deemed to become and thereafter be the maximum which such court deems reasonable and enforceable.

(g)The provisions of this Article VI shall survive the termination of this Trendar License.

(h)Comdata represents to TCH that Comdata's agreement with the Developer contains provisions adequate to afford to TCH the protections contemplated by this Section 6.2 in respect of any work contemplated to be undertaken by the Developer pursuant to Article II hereof.

(i) Notwithstanding the provisions of this Section 6.2 to the contrary, TCH acknowledges and agrees that it may be necessary for Comdata, solely through personnel working in its Merchant Services Division or Developer's personnel, to obtain access to Transaction information expressly for one of the following three (3) express and limited purposes: (i) correction of a Trendar System malfunction or failure; (ii) upon the express authorization or request of TCH; or (iii) to bill to TCH amounts which may be due under this Trendar License.

(j) TCH agrees to comply with Comdata's reasonable procedures and instructions, as the same may exist from time to time during the Term hereof for ensuring that the Trendar

System operates properly and that the Transactions are processed efficiently.

ARTICLE VII
Force Majeure

Neither Comdata, TCH nor the Developer shall be liable for any failure to perform due to acts of God, acts of government authorities which significantly inhibit or prohibit the use of the Trendar System contemplated hereby, wars, fires, floods, explosions, natural catastrophes, civil disturbances, strikes, riots, unusually severe weather (such as tornadoes), or failures or fluctuations in electrical power, heat, light, air conditioning, computer software or equipment, or communications equipment or networks ("Force Majeure"). In such event, the performance of such Person's obligations shall be suspended during the period of existence of such cause and the period reasonably required thereafter to resume performance of the affected obligation(s). The parties shall use their best reasonable efforts to minimize the consequences of Force Majeure.

ARTICLE VIII
Trendar System Availability; Disclaimer of Warranties; Limitation of Liability

8.1 Trendar System Availability. Comdata shall make available the services to be performed by Comdata through the Trendar System not less than ninety-nine and eight-tenths percent (99.8%) during any consecutive three (3) month period (exclusive of planned downtime scheduled for maintenance and communicated, in advance, to TCH).

8.2 TCH Card Availability. To the extent that TCH chooses to have its TCH Card processed over the Trendar System, TCH shall take all reasonable efforts to make available the services to be performed by TCH through the

TCH Cards on a continuous, uninterrupted basis and shall not deliberately or intentionally interrupt the services to be performed by TCH (exclusive of planned downtime scheduled for maintenance and communicated, in advance, to Comdata).

8.3 Disclaimer of Warranties; Limitation of Liability. To the extent not inconsistent with the intent of, and subject to the conditions set forth in, Sections 8.1 or 8.2:

(a)COMDATA MAKES NO WARRANTIES, WHETHER EXPRESS OR IMPLIED, WITH RESPECT TO THE TRENDAR SYSTEM OR ANY SERVICES OR EQUIPMENT PROVIDED IN CONNECTION THEREWITH INCLUDING, WITHOUT LIMITATION, ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. COMDATA'S SOLE RESPONSIBILITY TO TCH SHALL BE TO MAKE THE TRENDAR SYSTEM AVAILABLE FOR USE BY TCH IN ACCORDANCE WITH THE TERMS AND CONDITIONS OF THIS TRENDAR LICENSE. IN NO EVENT SHALL COMDATA BE LIABLE TO TCH OR ANY OTHER PERSON FOR CONSEQUENTIAL, INCIDENTAL, SPECIAL OR PUNITIVE DAMAGES, EVEN IF COMDATA HAD PRIOR KNOWLEDGE OF THE POSSIBILITY OF SAME.

(b)TCH MAKES NO WARRANTIES, WHETHER EXPRESS OR IMPLIED, WITH RESPECT TO THE TCH CARD OR ANY SERVICES OR EQUIPMENT PROVIDED IN CONNECTION THEREWITH INCLUDING, WITHOUT LIMITATION, ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. IN NO EVENT SHALL TCH BE LIABLE TO COMDATA OR ANY OTHER PERSON FOR CONSEQUENTIAL, INCIDENTAL, SPECIAL OR PUNITIVE DAMAGES, EVEN IF TCH HAD PRIOR KNOWLEDGE OF THE POSSIBILITY OF SAME.

ARTICLE IX
Indemnification

Each party hereto shall indemnify and hold the other party hereto, its directors, officers, agents, employees, contractors and representatives harmless from and against all claims, liabilities, causes of action, demands and expenses (including attorneys' fees, court costs and disbursements) by reason of, based upon, relating to or arising out of, a breach of any of the covenants, agreements, representations or warranties contained in this Trendar License, or attributable to the negligent or willful errors, acts or omissions of such indemnifying party, its agents, officers, employees or representatives. The party to be indemnified hereunder shall promptly notify the indemnifying party of any claim, demand, suit or proceeding with respect to which it seeks indemnification and, to the extent not inconsistent with Article XV to this Trendar License, the indemnifying party shall at all times have the right to defend, settle or compromise such claim, demand, suit or proceeding with counsel of its own choosing and in such manner as it may deem advisable.

ARTICLE X
Events Warranting Suspension

In the event that, at any time during the Term of this Trendar License, TCH shall fail (i) to make any payment to either Comdata or the Developer when such payment is due and owing pursuant to the terms and conditions of this Trendar License or (ii) to maintain the confidentiality of Comdata's Proprietary Information, then Comdata shall notify TCH in writing (the "Article X Notice") of such failure, setting forth the same in reasonable detail. If any such failure has not been corrected or cured by TCH within thirty (30) days of TCH's receipt of any such Article X Notice, Comdata shall be entitled to suspend, during the time period in

which any such failure exists and remains uncured, TCH's use or processing of the TCH Card and TCH Card Transactions through the Trendar System and TCH shall cease, during such period, from utilizing Comdata Proprietary Information, as set forth in Section 6.2 hereof.

ARTICLE XI
Financial Condition

11.1 Each party agrees to pay, when due and owing, amounts which may be due to the other pursuant to terms and conditions of this Trendar License. Further:

(a)TCH agrees that it shall not, during the Term of this Trendar License, make an assignment for the benefit of creditors, or shall admit in writing its inability to pay or shall generally fail to pay its debts as they mature or become due, or petition or apply for the appointment of a trustee or other custodian, liquidator or receiver of TCH or of any substantial part of the assets of TCH or shall not commence any case or other proceeding relating to TCH under any bankruptcy, reorganization, insolvency, readjustment of debt, dissolution or liquidation or similar law of any jurisdiction, now or hereafter in effect, or shall not take any action to authorize or in furtherance of any of the foregoing, or any such petition or application shall be filed or any such case or other proceeding shall not be commenced against TCH; and

(b)Comdata agrees that it shall not, during the Term of this Trendar License, make an assignment for the benefit of creditors, or shall admit in writing its inability to pay or shall generally fail to pay its debts as they mature or became due, or petition or apply for the appointment of a trustee or other custodian, liquidator or receiver of Comdata or of any substantial part of the assets of Comdata or shall not commence any case or other proceeding relating to Comdata under any bankruptcy, reorganization, insolvency, readjustment of debt, dissolution or liquidation or similar law of any jurisdiction,

now or hereafter in effect, or shall not take any action to authorize or in furtherance of any of the foregoing, or any such petition or application shall be filed or any such case or other proceeding shall not be commenced against Comdata.

ARTICLE XII
Use of Tradenames, Service Marks, Etc.

Neither party hereto is given nor will any party hereto claim in any way any right to or in the service marks, logos, trademarks, or tradenames belonging to the other or belonging to any Affiliate of the other, provided, however, that each party may use or display the name and logo of the other party hereto in connection with advertising and similar promotional literature.

ARTICLE XIII
Term

The Term of this Trendar License shall be for a period of ten (10) years, commencing as of the Effective Date and continuing thereafter through the tenth (10th) anniversary of such date (the "Expiration Date"). Upon the Expiration Date, TCH's use or processing of the TCH Card and TCH Card Transactions through the Trendar System shall cease and TCH shall cease from utilizing Comdata Proprietary Information, if any.

ARTICLE XIV
Miscellaneous

14.1 Notices. All notices under this Trendar License shall be in writing and shall be deemed to have been duly given when either (i) sent by overnight courier service with receipt confirmed, (ii) sent by facsimile with confirmation of receipt, (iii) personally delivered, or (iv) mailed, by certified or registered first class mail, postage prepaid, return receipt requested, to the party to whom the same is directed at the following address (or to such other address as a party may have specified by notice to the other party):

If to Comdata, to:

Comdata Network, Inc.
5301 Maryland Way
Brentwood, Tennessee 37027
Facsimile: (615) 370-7771

With a copy to:

Comdata Network, Inc.
5301 Maryland Way
Brentwood, Tennessee 37027
Attention: Legal Department
Facsimile: (615) 370-7614

If to TCH, to:

TCH LLC
4185 Harrison Blvd., Suite 202
Ogden, Utah 84403
Attention: Ted Jones
Facsimile: (801) 334-4661

With a copy to:

TCH LLC
4185 Harrison Blvd., Suite 202
Ogden, Utah 84403
Attention: Legal Department
Facsimile: (801) 334-4661

14.2 Compliance with Laws. Each party agrees that all actions taken by it under this Trendar License will comply in all material respects with all applicable laws and regulations.

14.3 Governing Law. This Trendar License shall be governed by and construed in accordance with the local laws of the State of Tennessee applicable to agreements made and to be performed in that State and not the choice of law rules of that State.

14.4 Assignment.

(a) This Trendar License shall be binding upon, and inure to the benefit of, the Parties hereto, including any Party which is expressly benefited or bound herein. It shall also be binding upon the Parties' respective successors and assigns, subsidiaries, divisions, groups, and Affiliates.

(b) This Trendar License shall not be assigned by either Party without the consent in writing of the other Party, which consent shall not be unreasonably withheld, except that either Party may assign its rights and obligations to a commonly controlled Affiliate without such consent, but in the event of any such assignment the assignor shall remain fully bound and obligated as if such assignment was void ab initio unless the other Party consents to release in writing.

14.6 Validity of Consideration. Each of Comdata and TCH acknowledge and agree that the consideration given and received for this Trendar License is sufficient and valid and that neither party will raise sufficiency of consideration as a defense to the enforcement of this Trendar License.

ARTICLE XV
Arbitration

15.1 Choice of Law. The designation of Tennessee law as the governing law for this Trendar License shall not be deemed an election of law to have the arbitration as set forth in this Article XV governed by the Tennessee Uniform Arbitration Act, TENN. CODE ANN. § 29-5-301, et seq., and shall not preclude application of the Federal Arbitration Act to any arbitration under this Trendar License.

15.2 The Parties agree that they will resolve any dispute, controversy, or claim arising from or relating to this Trendar License, including without limitation, the breach, termination, validity, revocation, or formation of this Trendar License, exclusively by confidential, final and binding arbitration according to the terms of this Article XV. This Article concerning arbitration is not intended to cover any future contractual or business relations that may develop between the Parties outside the terms of this Trendar License. The arbitration will be conducted in accordance with the CPR Institute for Dispute Resolution Rules for Non-Administered Arbitration ("CPR Rules") (attached as Exhibit 2 and available at http://www.cpradr.org/), except to the extent the specific provisions of this Trendar License provide otherwise. The arbitration will be governed by the Federal Arbitration Act, 9 U.S.C. § 1, et seq., ("FAA"). All final arbitration awards by the sole arbitrator, or panel of arbitrators if applicable, under this Article XV of this Trendar License shall be definitive and binding upon the Parties to the arbitration without judicial recourse. Judgment upon any award rendered by the arbitrator(s) may be entered by any court of competent jurisdiction, including the United States District Court for the District of Utah. Notwithstanding CPR Rule 9.5 or any other rules or provisions to the contrary, the Parties agree that the place of arbitration by the sole arbitrator, or panel of arbitrators if applicable, will be Washington, D.C.

15.3 Within thirty (30) days of any Party serving a written demand for arbitration of a dispute, controversy or claim covered by this Article, the Parties affected by such a demand for arbitration shall choose a mutually acceptable sole arbitrator who will have the exclusive authority to resolve any and all disputes, controversies, or claims that are arbitrable under this Article XV. The Parties anticipate that arbitrable disputes could arise at any time while this Trendar License remains in effect. If the Parties fail to reach agreement on a mutually acceptable sole arbitrator by the time the

first dispute, controversy, or claim arises under this Article, the process for selecting an arbitration panel of three arbitrators under CPR Rules 5.1 and 5.2 shall be used to select a panel of three arbitrators, of whom each Party shall designate one in accordance with the "screened" appointment procedure provided in CPR Rule 5.4.

15.4 In the event the Parties receive notice that the death, incapacitation, or resignation of the sole arbitrator renders him or her unfit or unable to perform his or her duties as arbitrator for this Trendar License, and the Parties cannot mutually agree on a replacement arbitrator within 60 days of receiving such notice, the sole arbitrator shall be replaced by a panel of arbitrators as selected in accordance with CPR Rules 5.1 and 5.2.

15.5 Until the arbitrator enters any arbitral award, the Parties will split the fees of the arbitrator with 50% of the fees to be paid by Flying J, or its successor in interest, and 50% of the fees to be paid by Comdata, or its successor in interest. Notwithstanding the Parties' initial payment of the arbitrator's fees, the arbitrator will have authority to tax all of the fees of the arbitrator against the non-prevailing Party as part of an arbitral award under the provisions of the CPR Rules.

15.6 The Parties agree that any breach of the arbitration provisions of this Article XV would cause irreparable injury for which monetary damages would be inadequate. Consequently, any Party to this Trendar License may obtain a preliminary and a permanent injunction to compel arbitration or otherwise enforce the provisions of this Article XV, or prohibit any action in violation of this Article.

IN WITNESS WHEREOF, Comdata and TCH, by and through their respective duly authorized and acting representatives, have executed and delivered this Trendar License to

be effective in accordance with the terms and conditions hereof.

Dated: May 18, 2001

Attest:

_____s/_____

COMDATA NETWORK, INC., d/b/a Comdata Corporation, a Maryland corporation

By: _s/ *Michael W. Sheridan*__
Name: Michael W. Sheridan
Title: Senior Vice President

Dated: May 18, 2001

Attest:

_____s/_____

TCH LLC, a Utah limited liability company

By: __s/ *Ted D. Jones*____
Name: Ted D. Jones
Title: Exec. V.P. Operations

Exhibit 1 to Trendar License: Decision and Order for *In re Ceridian Corp.*, FTC Docket No. C-3933 (April 5, 2000) [printed from FTC website: http://www.ftc.gov/os/2000/04/ceridian.do.htm]

9810030

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Robert Pitofsky, Chairman
Sheila F. Anthony
Mozelle W. Thompson
Orson Swindle
Thomas B. Leary

In the matter of

CERIDIAN CORPORATION, a corporation.

Docket No. C-3933

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the acquisition by Comdata Network, Inc., a wholly-owned subsidiary of respondent, of substantially all of the assets of NTS, Inc., and the acquisition by Comdata Holdings Corporation, a wholly-owned subsidiary of respondent, of Trendar Corporation, and the respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon accepted the executed Consent Agreement and placed such Agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to § 2.34 of its Rules, and having modified the Consent Order in certain respects, now in further conformity with the procedure described in § 2.34 of its Rules, the Commission hereby issues its Complaint, makes the following jurisdictional findings and enters the following Order:

1. Respondent Ceridian Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 8100 34th Avenue South, Minneapolis, Minnesota 55425.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply (where appropriate, words in the singular include the plural, and words in the plural include the singular):

A. "Acquisitions" means the acquisition of substantially all of the assets of NTS, Inc. by Comdata Network, Inc., a wholly-owned subsidiary of Ceridian, and the purchase of Trendar Corporation by Comdata Holdings Corporation, a wholly-owned subsidiary of Ceridian.

B. "Comdata" means Comdata Network, Inc., a Maryland corporation and wholly-owned subsidiary of Ceridian, with its office and principal place of business located at 5301 Maryland Way, Brentwood, Tennessee 37027.

C. "Comdata Business" means any division or entity within or controlled by Respondent that is engaged in, among other things, the development, issuance, distribution, sale or licensing of the Comdata Cards.

D. "Comdata Cards" means all of Comdata's current and future proprietary, private label Comchek®, TIC, NTS, EDS or other Fleet Cards, however named, issued by Comdata, either directly or indirectly through an approved third-party designated by Comdata, to Trucking Companies or truck drivers who use such cards to effect Transactions at Fueling Locations approved by Comdata; *provided, however*, that Comdata Cards shall not include cards for which Respondent does not have final authority to determine which POS Systems are permitted to effect diesel fuel purchases or data capture transactions for those cards. For the purposes of this Order, Comdata Cards shall be included as one type or kind of Fleet Card, as hereinafter defined.

E. "Comdata Confidential Information" means any information not in the public domain disclosed by Respondent to a Designated POS System Provider or Fleet Card Issuer, as applicable, in its capacity as the provider of the Comdata Cards or Trendar Services, respectively. Comdata Confidential Information shall not include: (1) information that falls within the public domain through no act, error, or omission by the Designated POS System Provider or Fleet Card Issuer, as applicable; (2) information that becomes known to the Designated POS System Provider or Fleet Card Issuer, as applicable, from a third party not in breach of a confidentiality or non-disclosure agreement with respect to such information; (3) information already known to the Designated POS System Provider or Fleet Card Issuer, as applicable, prior to requesting a license pursuant to Paragraph II. or III., respectively; and (4) information independently developed by the Designated POS System Provider or Fleet Card Issuer, as applicable, without reference to or use of any Comdata Confidential Information.

F. "Commission" means the Federal Trade Commission.

G. "Designated POS System Providers" means New System Providers that have received Commission approval and Incumbent System Providers.

H. "Fleet Card" means any card issued to cardholders who are authorized to use such cards to effect data capture Transactions or Transactions funded by the Fleet Card Issuer.

I. "Fleet Card Issuer" means any Person who (1) issues or seeks to engage in the business of issuing Fleet Cards to Trucking Companies, truck drivers, or other cardholders who may use such Fleet Cards to effect Transactions, provided that a Fleet Card Issuer must have, or seek to have, issued at least one thousand (1,000) Fleet Cards; or (2) develops a Fleet Card for the purpose of having it is-

sued by third-parties, provided that the Fleet Card Issuer must have, or seek to have, third-parties issue at least one thousand (1,000) Fleet Cards.

J. "Fueling Location" means any truck stop, gasoline service station, fueling service center, Terminal Fueling Facility, cardlock, or unattended fueling site.

K. "Incumbent System Provider" means any Person who is authorized by Respondent on the date Respondent signs this Order to effect all Transactions using any one (1) Fleet Card issued by Respondent.

L. "Injunctive Relief" means: (1) a permanent injunction obtained on or after January 1, 1994; (2) a temporary restraining order or preliminary injunction obtained on or after January 1, 1994 that is in effect; or (3) a temporary restraining order or preliminary injunction obtained on or after January 1, 1994 that has expired or terminated due to mootness, and was not obtained in an ex parte proceeding.

M. "New System Provider" means any Person not affiliated with Respondent who manufactures, markets, sells, deploys, maintains or has developed a POS System used by Fueling Locations to effect Transactions, and whose POS System has been operational at 25 Fueling Locations for a period of not less than six (6) months. The term "New System Provider" does not include any Incumbent System Provider.

N. "Non-Public Fleet Card Information" means any information not in the public domain disclosed by any Fleet Card Issuer (other than Ceridian) to Respondent in its capacity as the provider of Trendar Services. Non-Public Fleet Card Information shall not include: (1) information that falls within the public domain through no violation of this Order by Respondent; (2) information that becomes known to Respondent from a third party

not in breach of a confidentiality or non-disclosure agreement with respect to such information; (3) information already known to Respondent on the date it signs the Agreement Containing Consent Order; and (4) information independently developed by Respondent without reference to or use of any Non-Public Fleet Card Information.

O. "Non-Public Point of Sale Information" means any information not in the public domain disclosed by any Designated POS System Provider (other than Ceridian) to Respondent in its capacity as provider of the Comdata Cards. Non-Public Point of Sale Information shall not include: (1) information that falls within the public domain through no violation of this Order by Respondent; (2) information that becomes known to Respondent from a third party not in breach of a confidentiality or non-disclosure agreement with respect to such information; (3) information already known to Respondent on the date it signs the Agreement Containing Consent Order; and (4) information independently developed by Respondent without reference to or use of any Non-Public Point of Sale Information.

P. "Non-Public Programming Information" means any information not in the public domain disclosed by any Fleet Card Issuer (other than Ceridian) to the Third-Party Developer. Non-Public Programming Information shall not include: (1) information that falls within the public domain through no violation of this Order by Respondent; (2) information that becomes known to the Third-Party Developer from a third party not in breach of a confidentiality or non-disclosure agreement with respect to such information; (3) information already known to the Third-Party Developer on the date Respondent signs the Agreement Containing Consent Order; and (4) information independently developed by the Third-Party

Developer without reference to or use of any Non-Public Programming Information.

Q. "Person" means any individual, corporation, partnership, limited liability partnership, joint venture, association, joint-stock company, limited liability company, trust or unincorporated organization.

R. "POS Standards" means the following standards that a Designated POS System Provider must maintain: (1) its POS System complies with the same Comdata Card functional specifications as the Trendar System; (2) it promptly disseminates Comdata Card specification changes or updates that have been implemented on the Trendar System; (3) it provides twenty-four (24) hour support for its POS System; (4) its POS System is Year 2000 compliant; and (5) it maintains the confidentiality of all Comdata Confidential Information.

S. "POS System" means a point of sale purchase authorization system comprised of hardware, software, communications networks and related components used by Fueling Locations for any or all of the following purposes: (1) to obtain authorization for Transactions; (2) to capture and compile information related to such Transactions for themselves and others; and (3) to execute ancillary services related thereto as may be made available from time to time in connection with such POS System.

T. "Respondent" or "Ceridian" means Ceridian Corporation, its directors, officers, employees, agents, representatives, predecessors, successors and assigns, subsidiaries, divisions, groups and affiliates controlled by Ceridian Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

U. "Terminal Fueling Facility" means any fueling facility owned or operated by or on behalf of a Trucking Company.

V. "Third-Party Developer" means the Person designated by Respondent to perform the functions described in Paragraph III.C. of this Order.

W. "Transactions" means any diesel fuel purchase, cash advance, data capture, or any other type of transaction effected by a Fleet Card holder with the Fleet Card Issuer either: (1) by use of a Fleet Card; or (2) based on information, numbers, or data obtained from a Fleet Card. Transactions shall not include transactions that are not authorized by the Fleet Card Issuer.

X. "Transaction Fee" means the fee per transaction that a Fleet Card Issuer may charge to: (1) Fueling Locations authorized to accept the Fleet Card Issuer's Fleet Card; or (2) cardholders authorized to use the Fleet Card Issuer's Fleet Card.

Y. "Trendar Business" means any division or entity within or controlled by Respondent that is engaged in, among other things, the development, sale or licensing of the Trendar System or Trendar Services.

Z. "Trendar Facility" means any Fueling Location that has purchased or leased a Trendar System.

AA. "Trendar Services" means all services provided by Respondent that allow Fleet Card Transactions to be effected through the Trendar System, including, but not limited to: (1) reading the Fleet Card; (2) recognizing the Fleet Card's functions; (3) prompting for information required to execute Transactions; (4) transmitting information about Transactions; (5) communicating with the appropriate Fleet Card Issuer to seek authorization for Transactions; and (6) printing receipts with the requisite transaction information.

BB. "Trendar System" means all versions of the proprietary POS System developed, marketed, deployed or maintained by Respondent.

CC. "Trucking Companies" means companies and their employees and agents that operate trucks to haul their own products or provide trucking services to other Persons.

II.

IT IS FURTHER ORDERED that for the purpose of ensuring that Designated POS System Providers may effect Transactions originated by Comdata Cards, and to remedy the lessening of competition resulting from the Acquisitions as alleged in the Commission's complaint, Respondent shall:

A. Except as otherwise provided in this Order, for a period of three (3) years beginning on the date this Order becomes final, grant a ten (10) year unrestricted non-exclusive royalty-free license to effect Transactions originated by Comdata Cards to each Incumbent System Provider who notifies Comdata in writing after this Order is issued; provided, however, that Respondent may require the licensee to enter into a license agreement containing the Comdata Card License Conditions attached as Appendix I hereto;

B. Except as otherwise provided in this Order, for a period of three (3) years beginning on the date this Order becomes final, grant a ten (10) year unrestricted non-exclusive royalty-free license to effect Transactions originated by Comdata Cards to three (3) New System Providers. The licenses shall be granted, subject to the prior approval of the applicants by the Commission, to the first three (3) New System Providers who apply in writing by facsimile to the Federal Trade Commission's Bureau of Competition, Mergers I Division at (202) 326-2655 after this Order is issued, provided they subse-

quently become certified pursuant to Paragraph II.G. of this Order. The New System Provider applicants shall promptly notify Respondent in writing of their intent to seek a license under this Order. Paragraph II.B. of this Order is subject to the following conditions:

1. If any one of the New System Providers fails to be certified, the license shall be granted to another New System Provider in the manner set forth in this Paragraph II.B., and that is certified pursuant to Paragraph II.G.;

2. Any such license may be transferred by the New System Provider to any Person that meets the definition of a New System Provider and that is certified pursuant to Paragraph II.G. of this Order; and

3. Respondent may require the licensee to enter into a license agreement containing the Comdata Card License Conditions attached as Appendix I hereto;

C. Make available to any Person requesting a license: (1) a description of the procedures for obtaining a license; and (2) a copy of this Order;

D. Make available to any Person who so requests a list of the New System Providers that obtain a license to effect Transactions originated by Comdata Cards under Paragraph II.B. of this Order;

E. Within ten (10) days of receipt of a written request by a Designated POS System Provider, provide to the Designated POS System Provider any and all information or assistance necessary to enable the Designated POS System Provider to effect on its POS System the same Transactions originated by Comdata Cards on the Trendar System, including, but not limited to, specifications (including, as applicable but not limited to, transaction set information specifications, card track or other card identification specifications, pre- and post-authorization

specifications, settlement specifications, and receipt and report format specifications), protocols, programming, know-how, test accounts, site numbers, and host telephone numbers;

F. Include in each license with each Designated POS System Provider a provision that requires the Designated POS System Provider to provide the Monitor Trustee with any information or access requested by the Monitor Trustee relating to Comdata Cards for the purpose of determining whether Respondent is complying with Paragraph II. of this Order.

G. Within thirty (30) days of receipt of a written request by a New System Provider, either: (1) grant a written certification that such New System Provider's POS System successfully executes Comdata Card Transactions in conformance with the POS Standards and has a right to do so; (2) deny certification in the event the New System Provider's POS System fails to execute Comdata Card Transactions in conformance with the POS Standards, and that failure is solely a result of the New System Provider's act or omission; or (3) extend, upon mutual written consent with the New System Provider, the time within which the New System Provider may obtain certification through testing of the New System Provider's POS System;

H. Have the right to monitor processing of Comdata Cards by the POS System of the Designated POS System Provider to ensure continuing compliance with the POS Standards, provided that Respondent shall bear any cost associated with such monitoring; *provided, however*, that Respondent shall not terminate the license and may only suspend the license for the period that any Designated POS System Provider fails to comply with the POS Standards, provided that Comdata has furnished written notice, including an enumeration of all claimed deficien-

cies, ten (10) days in advance of suspension and the Designated POS System Provider has failed to cure the deficiencies within that time;

I. Not Charge the Designated POS System Provider any fee for the license to effect Transactions originated by Comdata Cards or for certification of the Designated POS System Provider's POS System; *provided, however*, that Respondent may charge a Transaction Fee to approved Comdata Card holders; *provided, further, however*, that nothing herein shall require Respondent to pay any Designated POS System Provider a fee for processing Comdata Card Transactions;

J. Not charge any Transaction Fee that is based upon which POS System a Fueling Location has purchased, leased, or otherwise acquired;

K. Not condition the availability of the Comdata Card or related services to any Fueling Location on whether such Fueling Location has purchased, leased, or otherwise acquired any POS System other than the Trendar System;

L. Provide all of the Designated POS System Providers that may process Comdata Card Transactions in accordance with the terms of this Order with equal access to Comdata Cards, including, but not limited to, all Comdata Card functions, changes, modifications, upgrades, or new card developments with sufficient notice and assistance so that the Designated POS System Providers may introduce such changes no later than they are introduced by Respondent; and

M. Notwithstanding any provision in this Paragraph, Respondent shall not be required to license (or continue to license) or provide any information under this Paragraph II. to any Person or an entity controlled by any such Person against whom Comdata or its predecessors have obtained Injunctive Relief to prevent the misuse, misap-

propriation, unauthorized use or improper disclosure or distribution of Comdata Cards, Comdata Card Transactions, Comdata equipment, data, information or other materials.

III.

IT IS FURTHER ORDERED that for the purpose of ensuring that Fleet Card Issuers may effect Fleet Card Transactions through the Trendar System, and to remedy the lessening of competition resulting from the Acquisitions as alleged in the Commission's complaint, Respondent shall:

A. Except as otherwise provided in this Order, for a period of three (3) years beginning on the date this Order becomes final, grant a ten (10) year unrestricted non-exclusive royalty-free license to the Trendar Services to any Fleet Card Issuer who notifies Comdata in writing after this Order is issued, provided it subsequently receives certification from the Third-Party Developer pursuant to Paragraph III.C. of this Order or becomes qualified pursuant to Paragraph III.D. of this Order; provided, however, that Respondent may charge a one-time access fee not to exceed US$30,000; provided, further, however, that Respondent may require the licensee to enter into a license agreement containing the Trendar License Conditions attached hereto as Appendix II;

B. Make available to any Person requesting a license: (1) a description of the procedures for obtaining a license, including, but not limited to, obtaining programming and certification services from the Third-Party Developer; and (2) a copy of this Order;

C. By the date this Order becomes final, enter into a contract, subject to the prior approval of the Commission, with an independent Third-Party Developer to perform all programming and certification services for Fleet Card

Issuers relating to the provision of Trendar Services that is subject to the following terms and conditions:

1. Respondent shall provide to the Third-Party Developer all assistance, specifications, protocols, programming codes, interfaces, and any other information used to effect Fleet Card Transactions, and necessary to enable the Fleet Card Issuer to effect Fleet Card Transactions through the Trendar System;

2. Respondent shall not receive either directly or indirectly any compensation for such programming and certification services;

3. The contract between Respondent and the Third-Party Developer shall provide that the Third-Party Developer shall:

a. Render such programming and certification services to any Fleet Card Issuer that notifies Comdata pursuant to Paragraph III. A. of this Order;

b. Certify any Fleet Card that is able to execute Transactions on the Trendar System;

c. Notify Comdata (which, in turn, shall notify the Commission and the Monitor Trustee if one has been appointed) of any request by a Fleet Card Issuer for programming and certification services;

d. Notify Comdata (which, in turn, shall notify the Commission and the Monitor Trustee if one has been appointed) within ten (10) days of denying certification, including any grounds for any denials;

e. Provide the Monitor Trustee, if one has been appointed, with access to the personnel performing such programming and certifica-

tion services, and the books, records and other relevant materials relating to the provision of (or inability to provide) such programming and certification services; and

f. Charge the Fleet Card Issuer a fee for such programming and certification services according to the schedule set forth in the contract between the Third-Party Developer and Respondent;

g. If the Third-Party Developer ceases to act or fails to act diligently, a substitute Third-Party Developer may be designated in the same manner as provided in this Paragraph III.C.;

D. In the event the Third-Party Developer fails to provide to any Fleet Card Issuer programming and certification described in Paragraph III.C. in a timely manner, provide, within a reasonable time period, or cause to be provided, to the Fleet Card Issuer all assistance, specifications, protocols, programming codes, interfaces, and any other information used to effect Fleet Card Transactions, and necessary to enable the Fleet Card Issuer to effect Fleet Card Transactions through the Trendar System;

E. Not terminate the license and may only suspend the license for the period that any Fleet Card Issuer fails to pay any amounts due to Respondent or the Third-Party Developer or fails to maintain the confidentiality of Comdata Confidential Information, provided that Comdata has furnished written notice, including an enumeration of all claimed deficiencies, ten (10) days in advance of suspension and the Fleet Card Issuer has failed to cure the deficiencies within that time;

F. Provide to every Trendar Facility designated by the Fleet Card Issuer all programming used to effect the Fleet Card Issuer's Fleet Card Transactions in the next regular quarterly release if such programming is completed at least thirty (30) days prior to such quarterly release or within three (3) months of the date such programming is completed, whichever is earlier;

G. Not charge any Transaction Fee to any approved Fueling Location that is based upon, or in any way related to, whether such Fueling Location accepts any Fleet Cards other than the Comdata Card;

H. Not condition the availability of the Comdata Card or related services to any Fueling Location on whether such Fueling Location accepts any Fleet Card other than the Comdata Card;

I. Provide all of the Fleet Card Issuers with equal access to the Trendar Services, including, but not limited to, all new developments, changes, modifications or upgrades relating to the Trendar Services with sufficient notice so that the Fleet Card Issuer may introduce such changes, if such Fleet Card Issuer elects to do so, no later than they are made available on the Trendar System; provided, however, that this provision shall not prevent Respondent from undertaking technological and other modifications to the Trendar System and/or its hardware, software, communications networks, and related components, including modifications that require changes to Fleet Cards processed through the Trendar System;

J. Have the right to discontinue the Trendar System should Ceridian reasonably determine the System is no longer commercially viable; and

K. Notwithstanding any provision in this Paragraph, Respondent shall not be required to license (or continue to license) or provide any information under this Paragraph

III. to any Person or an entity controlled by any such Person against whom Comdata or its predecessors have obtained Injunctive Relief to prevent the misuse, misappropriation, unauthorized use or improper disclosure or distribution of the Trendar System, Trendar Services, or any other Comdata equipment, data, information or other materials.

IV.

IT IS FURTHER ORDERED that:

A. Respondent shall not, absent the prior written consent of the proprietor of Non-Public Point of Sale Information, provide, disclose, or otherwise make available to any individual acting for the Trendar Business any Non-Public Point of Sale Information. Respondent shall use any Non-Public Point of Sale Information only in Respondent's capacity as a provider of the Comdata Cards or as otherwise provided by this Order, absent the prior written consent of the proprietor of Non-Public Point of Sale Information.

B. Respondent shall not, absent the prior written consent of the proprietor of Non-Public Fleet Card Information, provide, disclose, or otherwise make available to any individual acting for the Comdata Business any Non-Public Fleet Card Information. Respondent shall use any Non-Public Fleet Card Information only in Respondent's capacity as a provider of Trendar Services or as otherwise provided by this Order, absent the prior written consent of the proprietor of Non-Public Fleet Card Information.

C. Respondent shall not, absent the prior written consent of the proprietor of Non-Public Programming Information, obtain or seek to obtain, directly or indirectly, any Non-Public Programming Information. Respondent shall use any Non-Public Programming Information only in

Respondent's capacity as a provider of Trendar Services or as otherwise provided by this Order, absent the prior written consent of the proprietor of Non-Public Programming Information.

V.

IT IS FURTHER ORDERED that:

A. After the date this Order becomes final, the Commission may appoint a Monitor Trustee to monitor any disputes, claims or controversies under this Order as outlined in Paragraph V.B.4. below.

B. If a Monitor Trustee is appointed by the Commission, Respondent shall consent to the following terms and conditions regarding the Monitor Trustee's powers, duties, authority and responsibilities:

1. The Commission shall select the Monitor Trustee, the identity of the Monitor Trustee being subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Monitor Trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of the proposed Monitor Trustee, Respondent shall be deemed to have consented to the selection of the proposed Monitor Trustee;

2. Within ten (10) days after appointment of the Monitor Trustee, Respondent shall execute a Trust Agreement, subject to the prior approval of the Commission, that authorizes and permits the Monitor Trustee to perform the duties set forth in this Order;

3. The Monitor Trustee shall have the rights, duties, or powers necessary to perform the duties enumerated in Paragraph V.B.4. herein;

4. The Monitor Trustee shall prepare a written report and recommendation, if appropriate, which may include a finding of fault, with respect to each dispute or controversy arising out of: (a) each failure to grant certification or suspension of certification pursuant to Paragraph II. of this Order; (b) each instance when the Fleet Card Issuer alleges that the Third-Party Developer has failed to provide programming and certification services in a timely manner pursuant to Paragraph III. of this Order; (c) each failure to grant certification pursuant to Paragraph III. of this Order; or (d) Respondent's compliance with this Order;

5. If the Monitor Trustee elects to prepare a written report and recommendation, the Monitor Trustee shall issue such report and recommendation to the Commission within ninety (90) days after notification that a dispute or controversy exists;

6. The Monitor Trustee shall maintain the confidentiality of all confidential or proprietary information of Respondent, Designated POS System Providers, Fleet Card Issuers, and the Third-Party Developer, except that the Monitor Trustee may disclose to the Commission any confidential and proprietary information when reporting to the Commission on any matter bearing on compliance with the Trust Agreement and Order or bearing on the Monitor Trustee's performance of his duties;

7. The Monitor Trustee shall serve pursuant to the Trust Agreement from the time it is approved by the Commission for the term of the Order;

8. Respondent shall give the Monitor Trustee full and complete access to the personnel, facilities, computers, books, and records related to the performance of his duties under this Order. The Monitor Trustee shall attempt to schedule any access or requests for information in such a manner as will not unreasonably interfere with Respondent's operations;

9. The Monitor Trustee shall serve without bond or other security and shall use his best judgment in performing his duties hereunder. The Monitor Trustee shall be exempt from personal liability, to the extent permitted by law, for any action or decision not to act taken or made in good faith, except that the Monitor Trustee may be liable for misfeasance in performing under this Agreement or to the extent the loss, claim, damage or liability results from the Monitor Trustee's gross negligence, willful or wanton acts, or bad faith;

10. The Monitor Trustee shall have the authority to retain at the cost and expense of Respondent, and at reasonable fees, such employees, agents, consultants, or any other third party the Monitor Trustee determines to be reasonably necessary to assist in performing his duties hereunder;

11. The Monitor Trustee shall be compensated by Respondent for the reasonable value of his services as provided in the Trust Agreement. In addition to such compensation, Respondent shall compensate the Monitor Trustee for reasonable expenses and costs (including travel, lodging, meals and incidental items) incurred by the Monitor Trustee in connection with the discharge of his duties and efforts under the Trust Agreement;

12. The Monitor Trustee may recover his costs of collection, including reasonable attorneys fees, if Re-

spondent fails to pay compensation pursuant to Paragraphs V.B.10. and 11. herein; and

13. If the Monitor Trustee ceases to act or fails to act diligently, a substitute Monitor Trustee may be appointed by the Commission in the same manner as provided in this Paragraph.

VI.

IT IS FURTHER ORDERED that:

A. Within sixty (60) days after the date this Order becomes final and every sixty (60) days thereafter for one (1) year, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondent shall include in its compliance reports, among other things that are required from time to time: (a) a list of Designated POS System Providers that have applied for licenses to effect Transactions originated by Comdata Cards; (b) the state of certification (granted, denied, or pending) of the POS System of each such Designated POS System Provider; (c) a list of Fleet Card Issuers that have applied for licenses to effect Fleet Card Transactions through the Trendar System; (d) the state of certification (granted, denied, or pending) of the Fleet Card of each such Fleet Card Issuer; and (e) a full description of the efforts being made to comply with Paragraphs II. through V. of this Order.

B. One (1) year from the date this Order becomes final, annually until this Order has terminated, and at other times as the Commission may require, Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order.

VII.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order.

VIII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, upon written request, Respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondent relating to any matters contained in this Order; and

B. Upon five (5) days' notice to Respondent and without restraint or interference from it, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

IX.

IT IS FURTHER ORDERED that this Order shall terminate upon the later of: (a) April 5, 2003; or (b) the expiration of all licenses required by this Order.

By the Commission.

Donald S. Clark
Secretary

SEAL:

ISSUED: April 5, 2000

Attachment: Statement of the Commission

APPENDIX I

Comdata Card License Conditions

Respondent may require each Person licensed pursuant to Paragraph II. of this order to:

1. Comply with the POS Standards;

2. Permit Respondent to audit the licensee's POS System through an independent third-party that is subject to a confidentiality agreement prohibiting disclosure of the licensee's information that is not in the public domain to Respondent or any other Person;

3. Make available the services to be performed by the licensee to effect all Transactions through the licensee's POS system no less than 99.8% of the time (exclusive of downtime for maintenance) during every consecutive three (3) month period;

4. For any third-party products supplied to licensee by Respondent, comply with the licenses between Respondent and the third-party, return any third-party products supplied by Respondent in good working order upon expiration of the license or upon Respondent's written request, and hold Respondent harmless for any damages incurred in connection with the use of third-party products;

5. Consent to a provision under which Respondent and licensee each indemnify the other for any third-party claims resulting from any breach;

6. Consent to a provision prohibiting both the licensee and Respondent from disclosing the other party's confidential information as defined in the Order;

7. Consent to a provision under which Respondent and licensee shall hold each other harmless for any failure to perform due to force majeure;

8. Promptly pay any amounts due to Respondent relating to the license agreement;

9. Not be insolvent or in bankruptcy;

10. Cease processing Comdata Cards and using Comdata Confidential Information upon expiration or suspension of the license pursuant to Paragraph II.H. of this Order;

11. Consent to a provision under which Respondent and the licensee each acknowledge that the other has not obtained any right to the trademarks, trade names, service marks or logos belonging to the other through the license agreement; provided, however, that the licensee may display the Comdata Card name and/or logo in advertising and promotional information;

12. Consent that assignment of the license shall be only: (a) in accordance with Paragraph II.B. of the Order; or (b) in connection with the acquisition of the licensee's truck stop POS System business;

13. Consent to reasonable notice requirements pertaining to any notices required under the license agreement;

14. Consent to a provision under which Respondent and the licensee agree to comply with applicable laws and regulations;

15. Consent to a provision requiring that any legal action arising out of the license agreement be brought in the appropriate judicial forum located in Nashville, Davidson County, TN;

16. Consent to a provision requiring that the license agreement be governed by the laws of the State of Tennessee; and

17. Consent to a provision under which Respondent and licensee agree not to contest the license agreement on the ground of insufficiency or lack of consideration.

APPENDIX II

Trendar License Conditions

1. Respondent may require each Person licensed pursuant to Paragraph III. of this Order to:

2. Promptly pay any amounts due to Respondent or the Third-Party Developer relating to the license agreement;

3. Consent to a provision that states that Respondent is the exclusive owner of any programming performed by the Third-Party Developer relating to the Trendar System;

4. Identify which Fueling Locations accept the licensee's Fleet Card;

5. Consent to a provision prohibiting both the licensee and Respondent from disclosing the other party's confidential information as defined in the Order;

6. Consent to a provision under which Respondent and licensee each indemnify the other for any third-party claims resulting from any breach;

7. Consent to a provision under which Respondent and licensee shall hold the other harmless for any failure to perform due to force majeure;

8. Cease use of the Trendar System and any Comdata Confidential Information upon expiration or suspension of the license pursuant to Paragraph III.E. of this Order;

9. Consent to a provision under which Respondent and the licensee each acknowledge that the other has not obtained

any right to the trademarks, trade names, service marks or logos belonging to the other through the license agreement; *provided, however*, that the licensee may display the Trendar name and/or logo in advertising and promotional information;

10. Consent to reasonable notice requirements pertaining to any notices required under the license agreement;

11. Not be insolvent or in bankruptcy;

12. Consent that assignment of the license shall be only in connection with the acquisition of the licensee's trucking Fleet Card business;

13. Consent to a provision under which Respondent and the licensee agree to comply with applicable laws and regulations;

14. Consent to a provision requiring that any legal action arising out of the license agreement be brought in the appropriate judicial forum located in Nashville, Davidson County, TN;

15. Consent to a provision requiring that the license agreement be governed by the laws of the State of Tennessee; and

16. Consent to a provision under which Respondent and licensee agree not to contest the license agreement on the ground of insufficiency or lack of consideration.

No. 05-582

IN THE

Supreme Court of the United States

FLYING J INC., TCH, LLC, CFJ PROPERTIES, TON SERVICES, INC., AND TFJ,
Petitioners,

v.

COMDATA NETWORK, INC.,
Respondent.

On Petition for a Writ Of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENT COMDATA NETWORK, INC. IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals, applying state law, correctly construed a license agreement, granted as part of a settlement of earlier litigation, by referring to the language of the license agreement and the uncontroverted evidence of specific intent offered by both parties.

2. Whether the court of appeals properly applied the clearly erroneous standard of review when it determined that the district court's adopted findings erroneously stated that respondent had failed to offer evidence of its intent and erroneously failed to recognize that both parties had presented evidence about their specific intent that was dispositive of the claim.

3. Whether the court of appeals, while applying the clear error standard of review, properly followed this Court's decisions and criticized the district court for adopting verbatim the proposed findings submitted by petitioners.

PARTIES TO THE PROCEEDING

1. Respondent Comdata Network, Inc., was a defendant in the district court and was the appellant in the court of appeals.

2. Petitioners Flying J Inc., TCH, LLC, CFJ Properties, TON Services, Inc., and TFJ were plaintiffs in the district court and were appellees in the court of appeals.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent Comdata Network, Inc., is a wholly owned subsidiary of Ceridian Corporation. Ceridian Corporation is publicly held. No other publicly held entity has an interest in the respondent.

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IN THE

Supreme Court of the United States

No. 05-582

FLYING J INC., TCH, LLC, CFJ PROPERTIES, TON SERVICES, INC., AND TFJ,
Petitioners,

v.

COMDATA NETWORK, INC.,
Respondent.

On Petition for a Writ Of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENT COMDATA NETWORK, INC. IN OPPOSITION

Respondent Comdata Network, Inc. ("Comdata") respectfully submits this brief in opposition to the petition for a writ of certiorari in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 405 F.3d 821. The order of the court of appeals denying rehearing and rehearing en banc (Pet. App. 60a-61a) is unreported. The district court's order (Pet. App. 30a-59a) is unreported, but is available at 2003 U.S. Dist LEXIS 25684 (D. Utah Sept. 25, 2003).

STATEMENT OF THE CASE

This matter concerns the interpretation of a license agreement that was entered into by the parties as part of the settlement of litigation. In both the district court and the court of appeals, the parties relied exclusively on state-law rules of construction to interpret the so-called Trendar License, focusing on statelaw concerning the parol evidence rule and related state-law principles of contractual interpretation. *See, e.g.*, Flying J Br. (10th Cir.), at 26-33 & n.11 (available at 2004 WL 3551723) ("The Settlement Agreement provides that it shall be governed by Utah law . . ., while the Trendar License provides that it shall be governed by Tennessee law. . . . Both the Settlement Agreement and Trendar License were at issue in the trial court and are at issue in this appeal. As [District] Judge Kimball found, Tennessee law and Utah law concerning contract interpretation do not differ from each other materially . . . .").

Although petitioners argued that they intended the license to be pro-competitive, they never raised in the proceedings below the argument that federal law somehow should determine the license's meaning. Petitioners did not cite any of the cases they now rely upon for the proposition that federal antitrust law somehow should provide interpretive guidance in construing the state law license. Nor did petitioners identify any term in the Trendar License that had any specific meaning in the antitrust laws.

As a result, the first question presented by the petition has not been preserved for review. The only contractual interpretation questions raised in this case are governed by state law and do not warrant review here. Moreover, the other two questions set forth in the petition argue only that the court of appeals incorrectly applied established principles of law. Such claims seldom justify review; here, review is particularly inappropriate since petitioners' claims mischaracterize

the record and Judge McConnell's careful opinion, which faithfully applied controlling precedent.

A. Background

Petitioner Flying J Inc. ("Flying J") owns and operates a nationwide network of truck stops. In addition to its truck-stop business, Flying J's subsidiary, TCH, LLC ("TCH"), offers to trucking companies a proprietary payment card known as the "TCH card" and Flying J's other subsidiary, Transportation Alliance Bank, offers a MasterCard known as the "TCH MasterCard." *See* Pet. App. 3a-4a.

Respondent Comdata Network, Inc. ("Comdata") offers transaction-processing services to numerous industries, including the trucking industry. Comdata offers its own proprietary card, known as the "Comdata Card," and also offers a "Comdata MasterCard." In addition, Comdata sells to truck stops and other merchants the so-called "Trendar System," a PC-based point-of-sale hardware and software system that allows merchants to process customers' payment-card transactions. *Id.* Unlike Flying J, neither Comdata nor any of its corporate affiliates owns or operates any truck stops.

For merchants who have signed agreements to accept Comdata's payment instruments, Trendar is configured to clear their Comdata MasterCard transactions directly through Comdata, rather than the MasterCard network. MasterCard rules permit card issuers such as Comdata to process their cards on a proprietary basis, rather than through the MasterCard network, if they satisfy certain conditions. One such condition is that the merchant at which a transaction occurs has agreed to participate with the card issuer on a proprietary basis. Pet. App. 4a-5a, 9a. MasterCard's corporate designee testified without contradiction that the processing of Comdata's MasterCard was permitted pursuant to such a proprietary arrangement. Pet. App. 24a.

Merchants owning Trendar Systems who do not have agreements to accept Comdata payment instruments do not accept Comdata's proprietary card. If these merchants accept MasterCard, they are required by MasterCard's policies to accept all issuers' MasterCards, including the Comdata MasterCard. For these merchants, Trendar sends MasterCard transaction data to the MasterCard network for both authorization and settlement. At these locations, Trendar processes all MasterCard transactions similarly. *Id.*

B. The Litigation, Settlement, And Trendar License

In 1996, Flying J and its affiliates brought suit against Comdata and its affiliates in the United States District Court for the District of Utah, alleging antitrust violations. Pet. App. 6a.

The parties settled the case before the district court ruled on dispositive motions and before trial. As part of the settlement, Comdata agreed to pay $49 million and to provide plaintiffs with two licenses, one of which was the Trendar License at issue here. *Id.* Petitioners principally rely on Article 4.2 of the Trendar License, which provides:

> All TCH Card Transactions processed through the Trendar System, including without limitation TCH Cards bearing a MasterCard or Visa brand, shall be cleared directly through TCH as opposed to any third party network, such as and without limitation the MasterCard network or Visa network, to the fullest extent permitted by the policies, rules, or regulations, as amended from time to time . . . by third party network providers.[1]

---

[1] Petitioners attempt to piggy-back their claims on an FTC consent decree involving Comdata, claiming that the private antitrust settlement "afforded the same relief to Flying J that the public had received as the result of . . . [a] consent order between Comdata and the FTC." *See* Petition at 2. This assertion is false; the FTC consent decree included no provision comparable to Article 4.2 of the Trendar License. *See* Pet. App. 111a, 123a-127a, 135a-136a.

Pet. App. 96a. As the court of appeals observed, there is no dispute that Comdata paid plaintiffs $49 million. *Id.* There is also no dispute that Comdata reconfigured Trendar to accept and process the TCH card and the TCH MasterCard on a proprietary basis—that is, directly through TCH as opposed to through the MasterCard network—at those merchant locations that elected to accept the TCH card. Pet. App. 7a. As the court correctly summarized, "[t]his appeal concerns only the Trendar License as it pertains to processing the TCH MasterCard at unaffiliated merchants; that is, merchants who have not agreed to accept the proprietary TCH fuel card." Pet. App. 6a.

C. Petitioners' "Motion To Enforce" The Settlement And License

In their post-settlement motion, plaintiffs sought to enforce two different alternatives for processing TCH MasterCard transactions at unaffiliated merchants: (1) a primary model, which attempted to replicate, for TCH MasterCards, the proprietary model used for Comdata MasterCards, in which the entire transaction would be processed between the merchant and TCH; and (2) an alternative "split-transaction" model, proposed after the parties executed the settlement agreement and Trendar License, in which TCH would receive data from the merchant and authorize the transaction, but in which financial settlement would take place over the MasterCard network. *See* Pet. App. 8a-9a.

It is undisputed that shortly before the evidentiary hearing in the district court, "MasterCard confirmed in writing that Flying J's primary model did not meet its proprietary account rules." Pet. App. 9a. As the court of appeals explained based on the testimony of MasterCard's corporate representative: "Flying J's primary model depicted a proprietary transaction subject to MasterCard's proprietary account rules, which required prior agreement by the merchant." *Id.* Flying J had

not obtained such an agreement with *any* of the merchants at issue in this dispute; as mentioned above, the current dispute concerns only the processing of TCH MasterCard transactions at merchants who have *not* agreed to accept TCH's proprietary cards.

At the evidentiary hearing, plaintiffs therefore sought to enforce the implementation of the alternative split processing method, even though (a) the language of the Trendar License called for clearing "directly through TCH as opposed to any third party network," (b) plaintiffs testified that they had intended in the Trendar License to replicate the "Comdata model," (c) the Comdata model was used for processing Comdata MasterCard transactions only with merchants who agreed to participate with Comdata, and (d) the Comdata model did not involve split processing. Pet. App. 9a, 22a-28a. The split proposal thus sought to alter the Trendar License, under which Comdata could be required to route TCH MasterCard transactions through the TCH network only if MasterCard approved. As previously noted, MasterCard did not and would not grant approval for such processing with respect to merchant locations where TCH lacked agreements with merchants. Finally, the uncontroverted evidence showed that plaintiffs did not even conceive of splitting transactions until "shortly before the evidentiary hearing, well after the parties settled their claims in the underlying suit." Pet. App. 12a, 26a.

D. The District Court's Order

The district court ordered Comdata to implement the split-transaction method, adopting verbatim plaintiffs' advocacy-rich 29 pages of proposed findings of fact and conclusions of law. Pet. App. 10a-12a. The district court's adoption of petitioners' findings reflected the court's desire to dispose of this case—which the court believed it had settled in 2001—in

the most expeditious fashion possible. *See, e.g.*, Transcript of February 28, 2003 telephone conference ("And I really don't want to approach this piecemeal. You know, you have a case you thought was over, and we're back on the settlement stuff. And I'd just rather spend only one day worrying about it rather than take one issue at a time."). As a result of its adoption of petitioners' proposed findings, the district court ordered Comdata to reconfigure Trendar so that it would send detailed transaction data from a merchant to TCH—an affiliate of Flying J, which is a national competitor of merchants using Trendar—even without the merchant's consent, and despite both sides' evidence concerning their specific intent.

E. The Court Of Appeals' Opinion

On review of the district court's interpretation of the Trendar License, the court of appeals correctly observed that the threshold issue of whether an agreement is ambiguous involves a conclusion of law, warranting *de novo* review. Pet. App. 10a, 15a. Because both sides had agreed that Utah and Tennessee law were similar with respect to the dispositive legal issues, the court of appeals applied Utah substantive law to the dispute. Pet. App. 14a-15a n.4. The court of appeals therefore devoted considerable attention to principles of Utah contract law, as well as different meanings for the term "clear," different interpretations of the phrase "to the fullest extent permitted by" MasterCard rules, and both parties' testimony concerning the intent behind the Trendar License and Article 4.2. Ruling that the language of Article 4.2 would bear either party's interpretation, the panel concluded, as a matter of state law, that Article 4.2 of the Trendar License is ambiguous. Pet. App. 13a-19a.

Reviewing the record evidence concerning what the parties contemporaneously intended by Article 4.2, the court then held that the district court erred as a matter of law by not

considering, or even acknowledging, Comdata's evidence of intent. Pet. App. 20a-21a. The court then observed that "[t]he record is unequivocal on one point: both Flying J and Comdata intended the Trendar License to provide Flying J with data capture and purchase control similar to the 'Comdata model.'" Pet. App. 22a. Because "Comdata's cards were, and are, processed as single transactions," the court said, "[t]he most straightforward interpretation of Article 4.2 . . . is that TCH MasterCard transactions would be processed in the same way." *Id.* Moreover, the court stressed that "Flying J concedes that it did not conceive of the dual-processing model until after the parties entered into the Trendar License," and that the President of TCH "testified that he was not aware of any split transactions over the Trendar System." Pet. App. 26a.

In a brief dissent, Judge McKay observed that he believed the clearly erroneous standard of review required affirmance, but the dissent never addressed the majority's correct determination that the uncontroverted evidence of both parties' contemporaneous specific intent with respect to Article 4.2 precluded the district court's interpretation. Pet. App. 28a-29a.

Although petitioners now assert (Pet. 5) that "the court of appeals refused to consider the purpose of the antitrust laws of promoting competition and consumer welfare," the court did no such thing. Instead, the court correctly concluded that its function was not to disregard the language the parties actually used in the Trendar License and the evidence of the parties' actual specific intent with regard to that language in favor of a nebulous allegedly "pro-competitive" result:

> We have no occasion to question the district court's conclusion that Flying J's interpretation of Article 4.2 would better promote the competitive objectives of the antitrust laws. But the issue at this stage is not what would be the most effectual remedy for a proven

> antitrust violation; the issue is what the parties *agreed to* in settling the litigation. The parties did not frame their settlement in terms of maximizing competition, but in terms of a specific procedure for processing credit card transactions.

Pet. App. 22a (emphasis added). Based on the record before it, the court of appeals correctly held that the parties did not intend to require split-processing of TCH MasterCard transactions. By relying on the language of the agreement and both parties' specific intent, the court's opinion is fully consistent with both state and federal law, and presents no issue warranting further review.

The careful and thorough opinion also did not depart from established precedent concerning the scope of appellate review. Contrary to petitioners' characterizations that the court weighed competing testimony (Pet. 16-17), the court based its holding on the undisputed evidence offered by both parties, including Flying J's own concessions that it intended to replicate the "Comdata model" (which did not involve split processing for MasterCard transactions), and that it did not even *conceive* of split processing until well after the Trendar License was executed. Pet. App. 26a. The court of appeals applied a well-established standard of review and followed established precedent in applying that standard to the record before it.

Finally, with regard to the district court's adoption of petitioners' 29 pages of advocacy-rich proposed findings, petitioners do not and cannot dispute that the district court's order simply adopted their advocacy. In addressing this feature of the district court's decision, the court of appeals cited and followed this Court's teaching in *Anderson v. Bessemer City*, 470 U.S. 564 (1985). The court noted the difficulties presented by the district court's verbatim adoption, and at the same time made clear that "[t]he district court's adoption of a party's proposed findings does not change the

standard of review. . . ." Pet. App. 11a. Given the court's unequivocal statement that it was applying the clear error standard and given the court's unremarkable application of that standard to the record before it, petitioners' third question presented does not provide any basis for review here.

REASONS FOR DENYING THE PETITION

I. NONE OF THE QUESTIONS PRESENTED IS SUITABLE FOR REVIEW BY THIS COURT

Even apart from the merits, petitioners have not presented any question of the sort that this Court normally reviews. Much less have petitioners presented "compelling reasons" for review, within the meaning of this Court's Rule 10.

As to the first question presented, petitioners did not raise the issue in the district court or in the court of appeals—either before the panel or in their petition for rehearing. Petitioners neither cited any of the federal cases on which they base the first question in their petition nor did they argue that federal substantive law should provide any interpretive guidance with regard to the Trendar License. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993).

Giving their submissions below the most generous reading, petitioners argued that, when they negotiated the Trendar License, they generally intended to produce a pro-competitive effect. Petitioners never contended, however, that the federal antitrust laws should control or guide the relevant issue of contract interpretation. Instead, both parties briefed and argued the matter entirely as a matter of state contract law. This Court does not sit to resolve disputes regarding the proper interpretation of a contract under state law.

Even if the first question had been properly raised and a federal question properly presented, petitioners' claim of a conflict, either with decisions of this Court or with decisions of other courts of appeals, is illusory. As we explain in greater detail below, all of the federal cases that petitioners now cite are readily distinguishable from the present case and do not turn on legal principles in conflict with those applied by the court of appeals.

Petitioners' second and third questions do not identify any erroneous standard adopted by the court of appeals, and instead complain about the application of a properly articulated rule of law. As Rule 10 explains: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

Petitioners identify *Anderson v. Bessemer City*, 470 U.S. 564 (1985), and Rule 52's "clearly erroneous" standard as providing the governing law respecting the scope of review. Pet. 16-19. The court of appeals, however, expressly cited and followed both Rule 52's "clear error" standard and the teachings of this Court in *Anderson*. Pet. App. 11a-12a. At most, therefore, petitioners complain about the court's application of the proper legal standard to the record in this case. That is not normally an appropriate basis for review by this Court. In any event, as we discuss at greater length below, the court of appeals did not misapply the proper legal standards in this case. To the contrary, its careful and thorough opinion is faithful to both the record and the established principles of appellate review.

II. IN ANY EVENT, THE COURT OF APPEALS' DECISION IS CORRECT, AND FURTHER REVIEW IS NOT WARRANTED

A. The Court Of Appeals Properly Construed The Trendar License

The court of appeals' careful opinion followed hornbook contract law in construing the Trendar License. None of the authorities now cited for the first time by petitioners suggests a different conclusion.

First, this case does not concern the interpretation of a consent decree. The contract at issue was a private settlement agreement, not an order of the court. Second, the court of appeals did not "refuse to consider the purpose of the antitrust laws . . . ," as petitioners claim. Instead, as previously noted, the court was unwilling to displace the language of the Trendar License and both parties' specific intent concerning that language by turning to an amorphous policy goal of the antitrust laws as a basis for reaching a result at odds with the parties' language and specific intent. In this latter regard, the court of appeals' opinion is fully consistent with both decisions from this Court cited by petitioners, *United States v. Armour & Co.*, 402 U.S. 673 (1971), and *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975).

In *Armour*, this Court rejected the very approach now urged by petitioners, focusing instead on the process of negotiation that leads to the entry of a consent decree and the fact that settling parties waive their rights to present their claims or defenses in litigation in exchange for a *particular and specific compromise*:

> Consent decrees are entered into by parties after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the

> agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve.

402 U.S. at 681-82. Based on these observations, the *Armour* Court rejected contentions strikingly similar to those advanced by petitioners here:

> For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.

Id. at 682.

This Court's subsequent holding in *ITT* neither altered the holding in *Armour* nor supports petitioners' contentions here. In *ITT*, the Court explained that the construction of consent decrees should follow the very hornbook principles of contractual interpretation employed by the court of appeals in this case:

> Since a consent decree or order is to be construed for enforcement purposes basically as a contract, reliance upon certain aids to construction is proper, as with any other contract. Such aids include the circumstances surrounding the formation of the consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated

> into the decree. Such reliance does not in any way depart from the "four corners" rule of *Armour*.

420 U.S. at 238 (footnote omitted).

In *ITT*, the question was whether a violation of the prohibition in a consent decree against the defendant's "acquiring" other bakeries was a single violation subject to a one-time fine at the completion of the purchase or a violation that continues from acquisition until divestiture. The record did not include evidence that both parties had assigned the same meaning to the key provision in dispute. Moreover, the consent decree in *ITT* specifically provided that the complaint could be used to construe the terms of the consent decree, and the complaint demonstrated that the term "acquiring" referred to both the purchase and retention of assets. *Id.* at 238-39. Finally, the key term in *ITT* had a specific technical meaning in the antitrust context: in the Clayton Act and antitrust case law, "acquiring" meant both the purchase and retention of assets. *Id.* at 240-43.

Here, the court of appeals painstakingly evaluated the evidence offered by both parties that demonstrated that *neither* party intended the "split transaction" and contractual interpretation urged by petitioners. Pet. App. 20a-28a. Indeed, the court's opinion noted that petitioners never even conceived of what they now claim the contract required until years after they executed the Trendar License. Pet. App. 26a. Thus, the present case is quite unlike *ITT*.

Moreover, petitioners do not suggest that any key term in Article 4.2 of the Trendar License has any meaning specified by the antitrust laws. Instead, they contend that the court of appeals should have subordinated the particular language of the Trendar License and both parties' contemporaneous specific intent concerning that language in favor of petitioners' generalized views concerning the pro-competitive purposes of the antitrust laws. In essence, petitioners suggest

that the court of appeals should have disregarded what the parties actually intended and said in the settlement, and the court instead should have based its decision on a free-floating search for a result that allegedly would be "most competitive." Petitioners' argument is directly contrary to *Armour*, not supported by *ITT*, and would deprive settling litigants of the bargains they negotiate in exchange for relinquishing their claims and defenses in litigation.

Similarly, none of the cases cited by petitioners from the federal courts of appeals conflicts with the decision below. In none of these cases did the court of appeals override the parties' chosen language and the specific intent regarding that language by relying on some notion of the generalized purposes of the substantive law at issue. Moreover, in each of the cases that actually touches on the question, the court either construed a specific term in the consent decree that had a specific meaning in the substantive law or the court used the underlying substantive law merely to confirm that the court's interpretation of the decree did not run afoul of that law. Here, however, petitioners have identified no term in Article 4.2 that has any relevant meaning in the antitrust laws, and even petitioners do not suggest that anything in the court of appeals' opinion runs afoul of the antitrust laws.

For example, *McDowell v. Philadelphia Housing Authority*, 423 F.3d 233 (3d Cir. 2005), concerned the interpretation of a consent decree settling a claim brought pursuant to the Housing Act. *Id.* at 236. Judge Alito noted that "[s]ince a consent decree issued upon the stipulation of the parties has the characteristics of a contract, contract principles govern its construction." *Id.* at 238. After reviewing the decree, the Third Circuit concluded that the decree was unambiguous, and enforced the decree according to its terms. *Id.* at 239.

The Third Circuit went on to note that its interpretation was consistent with the HUD regulations that the consent decree

tracked, and cited *ITT* for the proposition that a court may look to relevant statutes and regulations "to shed light on the *terms* of a consent decree." *Id.* (emphasis added). However, the court expressly disavowed any intent to make its understanding of the regulations controlling over its interpretation of the consent decree, noting that "the regulations clearly resolve it in the tenants' favor. In this respect, the regulations do not guide our interpretation so much as confirm it." *Id.* at 240. *McDowell* thus is fully consistent with the opinion below.

In *Gilday v. Dubois*, 124 F.3d 277 (1st Cir. 1997), *cert. denied*, 524 U.S. 918 (1998), the First Circuit interpreted the term "specifically permitted" in a consent decree. *Id.* at 285. Although the court stated that it would consider "the basic purposes [the consent decree] was designed to serve," the court resolved the contractual interpretation question, not by looking to the decree's purposes, but primarily through both parties' contemporaneous expressions of intent with regard to the key term. *Id.* at 286-87. In this regard, the court's holding in *Gilday* is actually similar to that of the court below, which also was based on the evidence of record concerning both parties' contemporaneous intent.

In *United States v. Reader's Digest Association, Inc.*, 662 F.2d 955 (3d Cir. 1981), the question concerned whether the term "confusingly" required actual confusion or merely the tendency to confuse. *Id.* at 960. Citing *ITT* and *Armour*, the court stated that although a consent decree "must ordinarily be interpreted by examination of only the 'four corners' of the document, the complaint may be used as an aid in construction when the parties so provide." *Id.* at 961 (internal citations omitted). Unlike the settlement agreement and license in this case, the consent decree in *Reader's Digest* expressly provided that the complaint could be used to construe the terms of the consent decree, and the complaint revealed that

actual confusion was not required. *Id.* *Reader's Digest* is thus not in conflict with the opinion below.

Turner v. Orr, 785 F.2d 1498 (11th Cir. 1986), concerned whether the defendants were responsible for paying costs and attorney's fees only if it was determined that "'a violation of the Judgment had occurred,'" or if defendants had to pay "the expenses reasonably incurred by the Plaintiffs' Monitoring Committee in carrying out its duties under this Judgment." *Id.* at 1501-02. Both phrases were included in the consent decree. *Id.* The court examined documents that were expressly incorporated into the decree, including notices that were sent to class members during the time the parties were finalizing the consent decree and a contemporaneous stipulation indicating that the defendants understood they would pay "the expenses reasonably incurred" pursuant to the consent decree. *Id.* at 1503. The court in no way resorted to the general purposes of the underlying federal substantive law to undermine the particular language or the parties' contemporaneous specific intent.

Brown v. Neeb, 644 F.2d 551 (6th Cir. 1981), also fails to support petitioners' claim of a circuit conflict. *Brown* concerned the interpretation of a consent decree settling discrimination claims in the Toledo fire department. The consent decree expressly stated that the city of Toledo wished to "'erase any vestiges of past employment discrimination.'" *Id.* at 557. The decree also included a stated goal to have "'the ratio of minority employment within the fire division reasonably reflect the ratio of each minority group's total population of the city of Toledo.'" *Id.* at 558. The court merely held that it should construe the decree consistently with the purposes explicitly set forth in the decree itself. There is no inconsistency between *Brown* and the opinion below.

In *United States v. Microsoft Corp.*, 147 F.3d 935 (D.C. Cir. 1998), the D.C. Circuit construed an "anti-tying" provision in an antitrust settlement. In an approach that is fully

consistent with the approach taken here by the court of appeals, the court explained:

> As *Armour* makes clear, however, an antitrust consent decree cannot be read as though its animating spirit were solely the antitrust laws. "[T]he decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve."
>
> The court's task, then, is to discern the bargain that the parties struck; this is the sense behind the proposition that consent decrees are to be interpreted as contracts. To find the meaning of an ambiguous provision we look for the intent of the parties, just as we would with a contract. *See Western Elec. Co.*, 12 F.3d at 231-32 (reading ambiguous provision of consent decree "in light of the parties' jointly intended purpose" (internal quotation omitted)); *NRM Corp. v. Hercules, Inc.*, 758 F.2d 676, 681-82 (D.C. Cir. 1985) (contract interpretation). In that quest we may rely on the same aids to construction as we would when interpreting an ambiguous contract, including "the circumstances surrounding the formation of the consent order."

147 F.3d at 946 (certain citations omitted).

Having articulated these general principles, the D.C. Circuit construed the consent decree in a manner that gave effect to the parties' joint intent. 147 F.3d at 948. It further stated that its interpretation was *consistent with* the antitrust laws. *Id.* Contrary to petitioners' suggestion, the court did not construe the agreement according to the "purposes" of the antitrust laws, but instead looked for an interpretation that was both in accordance with the parties' mutual intent and that did not run afoul of the antitrust laws. Petitioners, of course, have not contended that the opinion below is contrary to the antitrust laws, and, unlike *Microsoft*, they have not

identified any term in the Trendar License that has any particularized meaning under the antitrust laws.

In *United States v. Western Electric Co.*, 894 F.2d 1387 (D.C. Cir. 1990), the court considered whether the term "manufacture" included merely fabrication or also design and development. *Id.* at 1388-89. The court rejected an approach to construction based on one party's purposes or the goals of the federal legislation upon which the underlying litigation was based, opting instead to base its opinion on both parties' contemporaneous expressions of intent. The court explained:

> The District Court's interpretation of the Decree is not designed to implement the purpose of only one party, *see Armour*, 402 U.S. at 682, 91 S. Ct. at 1757, or to implement the purpose of the Sherman Act independently of the parties' intentions, *see ITT Continental Baking Co.*, 420 U.S. at 236-37, 95 S. Ct. at 934-35. As the contemporaneous statements of both parties make clear, the terms on which AT & T and the United States settled the AT & T litigation were intended to eliminate "the potential for monopoly abuse in the future" by "remov[ing], clearly and efficiently, the structural problems that have given rise to the controversies between the United States and AT & T over the last three decades."

Id. at 1392 (emphasis deleted). Thus, *Western Electric* also does not conflict with the opinion below.

Finally, in a last-ditch effort to manufacture a conflict, petitioners point to alleged "internal inconsistencies" in the Second and Seventh Circuits. Such intra-circuit inconsistencies, even if they existed, would not provide any basis for review here; they are appropriately addressed by the relevant court of appeals. In any event, however, none of the cases cited by petitioners reveals any actual internal conflict in either the Second or Seventh Circuits, and none of the cases supports petitioners' contention that a court should subvert

the language of the agreement or the contemporaneous specific intent of both parties by reference to the general purposes of a federal statutory scheme.

B. The Court Of Appeals Adhered To Controlling Principles Of Appellate Review

Petitioners erroneously claim (Pet. 16) that the "Tenth Circuit reversed the district court's findings based on its own perception of the credibility of the parties' key witnesses—Messrs. Adams and Sheridan . . . ." In fact, the court of appeals engaged in no such weighing of credibility.

With respect to Mr. Sheridan's testimony, the district court adopted proposed findings written by petitioners that erroneously stated that "Comdata did not present evidence at the hearing indicating that the parties did not intend to accomplish this result [*i.e.*, the split processing] through the Trendar License. Mr. Sheridan participated in the negotiation of the Trendar License but did not offer testimony specifically contradicting that explanation of the parties' intent." Pet. App. 20a. The court of appeals correctly observed that this statement was clear error:

> Comdata's chief counsel, Michael Sheridan, testified that Comdata intended to replicate its own processing model for Flying J. . . . He specifically disavowed any intention to authorize split transactions. . . .

Id. (quotations from Mr. Sheridan omitted). Consistent with settled principles of appellate review, the court of appeals held that given the adopted finding of "no evidence," the district court's "failure to consider [Mr. Sheridan's testimony] was a legal error." *Id.* at 834-35, App. 20a-21a.

Nor did the court of appeals weigh the testimony or make credibility determinations. Instead, the court repeatedly observed that Mr. Adams' and petitioners' intent concerning the provision at issue was fully consistent with that of Mr.

Sheridan: both parties intended that any processing of TCH MasterCards would either be directly through TCH pursuant to the Comdata model or through the MasterCard network; neither intended that Trendar would be required to split a transaction. Pet. App. 20a-28a. Indeed, petitioners' own evidence revealed that they did not even conceive of split processing until well after the Trendar License was executed. Pet. App. 26a.

C. The Court Of Appeals Correctly Applied This Court's *Anderson* Opinion

In *Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985), this Court repeated its history of criticizing district courts "for their verbatim adoption of findings of fact prepared by prevailing parties, particularly when those findings have taken the form of conclusory statements unsupported by citation to the record." (citing *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964); *United States v. Marine Bancorporation*, 418 U.S. 602, 615 n.13 (1974)).

Petitioners do not dispute that the district court adopted verbatim their 29 pages of advocacy-filled proposed findings of fact and conclusions of law. Instead, plaintiffs suggest that this Court should alter its view of the propriety of such verbatim adoptions and actually *encourage* district judges to follow the flawed approach taken by the district court in this case.

This Court has never suggested that a district court cannot use findings proposed by the parties to fashion its own findings or that a district court cannot incorporate portions of proposed findings. Here, however, the district court adopted verbatim 29 full pages of findings proposed by petitioners, with only the most modest of cosmetic changes such as modifying "I find" to "the court finds." Pet. App. 11a n.2. Such verbatim wholesale adoption of a party's lengthy findings suggests a lack of detached and independent analysis

by the district court, and this Court's previous criticism of such an approach is fully justified.

Petitioners' contentions to the contrary are without merit. As this Court has observed, blanket adoption of a party's proposed findings is undesirable, in part because of the "potential for overreaching and exaggeration on the part of attorneys preparing findings of fact . . . ." *Anderson*, 470 U.S. at 572. Here, consistent with *Anderson*, although the court of appeals criticized the district court's adoption of petitioners' findings, it nevertheless held that "[t]he district court's adoption of a party's proposed findings does not change the standard of review . . . ." Pet. App. 11a. Because the court of appeals properly identified and applied the controlling standard of review, the court's criticism of the procedure followed by the district court both followed established precedent and did not affect the outcome.

CONCLUSION

The petition for a writ of certiorari should be denied.

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January 6, 2006

(3)

No. 05-582

IN THE

Supreme Court of the United States

FLYING J INC., TCH LLC, CFJ PROPERTIES, TON SERVICES, INC., AND TFJ,

Petitioners,

v.

COMDATA NETWORK, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF FOR PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF FOR PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioners Flying J Inc., TCH LLC, CFJ Properties, TON Services, Inc., and TFJ (collectively, "Flying J") respectfully submit this Reply Brief in support of their petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Comdata contends this case does not present a question of federal law. Yet Comdata ignores that: a) the district court sought to interpret the disputed settlement agreement and license in a manner that would promote competition and consumer welfare; and b) the court of appeals majority opinion refused, over the dissent's objection, to consider the goals of the antitrust laws when the majority imposed its own interpretation of these agreements. Thus, Comdata misconstrues the rulings below to defend the court of appeals' ruling, which protects Comdata from competition in the concentrated markets where it holds a dominant market share.

This case presents a rare and important opportunity for this Court to confirm and clarify that federal courts should interpret antitrust settlement agreements in a manner consistent with the goals of the federal antitrust laws. This case also presents an extreme example of a court of appeals failing to respect trial court fact findings and offering unwarranted criticism of the efficient practice of requesting both parties to submit proposed findings of fact and conclusions of law in a complex case. Therefore, the Court should grant the petition.

I. Comdata's Response Avoids The Key Issue Presented Of Whether Federal Courts Can And Should Consider The Procompetitive Goals Of The Antitrust Laws When Enforcing Antitrust Settlement Agreements.

Comdata seeks to avoid the key issue presented with various arguments casting the underlying settlement agreement as just a contract to be interpreted under state law. Yet Comdata's arguments cannot obscure what both lower courts acknowledged: that this settlement compromised antitrust claims that sought to restore competition to markets that Petitioners contended Comdata has monopolized. The district court considered it significant that the settlement involved a compromise of such antitrust claims, and the Tenth Circuit majority opinion held, despite the dissenting judge's contrary view, that it is improper to consider that context. Litigants need this Court's guidance on that issue.

A. Both The District Court And The Tenth Circuit Addressed The Issue That Comdata Contends Was Not Preserved, Of Whether The Parties' Settlement Should Be Construed In Light Of The Goals Of The Antitrust Laws.

Comdata cannot change the fact that both the district court and Tenth Circuit addressed the point that Comdata contends was not preserved, of whether courts should consider the goals of the federal antitrust laws when interpreting an antitrust settlement agreement like the one at issue here. *See* Petition at 4-5 (quoting from lower courts' decisions). Comdata is mistaken in suggesting, Opp. Br. at 2, 10, that Petitioners cannot ask this Court to review the Tenth Circuit's holding that "it is not our task to determine what would best remedy the underlying antitrust violation," 405 F.3d at 825; Pet. App. 3a, or the dissent's disagreement with that holding, 405 F.3d at 839, Pet. App. 28a-29a.

Comdata seeks to justify its continued exclusion of the TCH fuel card from meaningful access to the Trendar device needed to process trucker fuel card transactions with data capture and purchase control functionality. *See* Opp. Br. at 2-10. Yet Comdata never addresses the evidence the Tenth Circuit noted about "the underlying antitrust violation," 405 F.3d at 825, 827; Pet. App. 3a & 6a, and Comdata cannot deny the context in which the parties settled the underlying antitrust claims.

B. Comdata's Summary Of Lower Court Cases Applying This Court's Precedents In *ITT* and *Armour* Merely Demonstrates That The Lower Courts Do Need Guidance On The Important Issue Presented Here.

Comdata's response presents an extended summary of minutiae about the lower court decisions identified in the Petition that construe *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975) and *United States v. Armour & Co.*, 402 U.S. 673 (1971). Opp. Br. at 15-19. Yet that summary cannot obscure the conclusion that the lower courts have applied *ITT* and *Armour* inconsistently as explained at pp. 10-15 of the Petition.

Comdata's pronouncement that none of these lower court decisions conflicts with the Tenth Circuit decision challenged here depends on its characterization of that decision. According to Comdata, the Tenth Circuit chose not to "override the parties' chosen language and the specific intent regarding that language by relying on some notion of the generalized purposes of the substantive law at issue." Opp. Br. at 15.

In fact, however, the Tenth Circuit reversed the district court in part because that court *did* consider the context in which the parties entered into their settlement. *See* Pet. at 5; *see also* Pet. at 6 (quoting Judge McKay's dissent: "What

we do know is that the overall purpose of the license was to open access to the market. . . . . The district court's selection of the interpretation that favors optimal opening of the competitive market seems to me to be eminently reasonable and supported by the record. Resolving any doubt in favor of the purpose of the antitrust statutes strengthens this conclusion." 405 F.3d at 839; Pet. App. 29a).

Comdata's rhetoric about alleged "specific intent" cannot change the principle this Court recognized in *ITT*, and the D.C. Circuit recognized in the *Microsoft* and *Western Electric* cases, that evidence surrounding an agreement's negotiation and tending to explain ambiguous terms should be admissible. *See* Pet. at 9, 12; *ITT*, 420 U.S. at 238 & n.11 (proper to consider circumstances surrounding formation of consent order); *Microsoft Corp.*, 147 F.3d at 946 ("the consent decree emerged from antitrust claims"); *Western Electric Co.*, 894 F.2d at 1392 (proper to consider context of consent decree). As explained in the Petition, the lower courts have not consistently handled the information about the context of an antitrust settlement and the Tenth Circuit's challenged decision below rejected the relevance of that antitrust context. Pet. at 10-15.

II. Comdata's Response Minimizes The Tenth Circuit's Failure To Respect The District Court's Fact-Finding Role.

Comdata attempts to minimize the Tenth Circuit's misapplication of principles governing "clearly erroneous" review of fact findings. Opp. Br. 20-21. Yet no amount of rationalizing can change that the Tenth Circuit reversed the district court's fact findings because it found the testimony of Comdata's witness (Mr. Sheridan) more persuasive than Flying J's witness (Mr. Adams).

The Tenth Circuit should not have subverted the rule this Court established in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985). The Tenth Circuit's ruling represents an extreme departure from this Court's guidance in *Anderson*. The Court should grant the Petition to demonstrate to courts of appeals that they cannot overturn a district court's fact findings simply because they disagree with the district court's decision to credit the testimony of one witness over another.

III. Comdata's Response Also Minimizes The Harm From The Tenth Circuit's Unwarranted Criticism Of The Efficient Procedure Of A District Court Requesting And Relying On Proposed Findings From Each Side In A Complex Case.

Finally, Comdata cannot reasonably justify the Tenth Circuit's unwarranted criticism of the district court's procedure of requesting and relying on proposed findings of fact and conclusions of law from both sides in this complex case. Opp. Br. at 21-22. The fact that the district court did not find Comdata's proposed findings persuasive did not make this procedure inappropriate or unfair.

The Tenth Circuit's criticism of this procedure sends entirely the wrong message and will chill the use of an appropriate and efficient procedure by trial judges involved in technically complex cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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